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Recent Developments

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RECENT DEVELOPMENTS

ADMINISTRATIVE LAW AND PROCEDURE — STANDING — A CONSERVATION GROUP WHICH CHALLENGES AN ADMINISTRATIVE AGENCY ACTION ALLEGEDLY CONTRAVERSING AN ENVIRONMENTAL INTEREST IS NOT INJURED IN FACT UNLESS SOME OF ITS MEMBERS RESIDE NEAR THE AFFECTED AREA.

Citizens Committee for the Hudson Valley v. Volpe (2d Cir. 1970)
Sierra Club v. Hickel (9th Cir. 1970)

Recently, two federal circuit courts reached seemingly irreconcilable conclusions concerning whether or not private conservation organizations have the requisite standing to challenge allegedly unlawful administrative agency actions. In one case, plaintiffs, a local citizens group, a national conservation organization, and a municipality of New York, brought an action requesting that a filling and dredging permit issued by the Army Corps of Engineers\(^1\) to the State of New York\(^2\) be voided as being issued beyond the Corps' statutory authority,\(^3\) and that an injunction be granted prohibiting the issuance of another permit or the commencement of construction without congressional consent\(^4\) and approval by the Secretary of Transportation.\(^5\) Defendants sought to have the complaints dismissed on the grounds that the district court did not have subject matter jurisdiction over the dispute, and that the plaintiffs did

1. The Corps issued the permit pursuant to its authority under the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 401 et seq. (1964). Defendants contended that construction of the proposed landfill was referable only to section 10 thereof, 33 U.S.C. § 403 (1964), which prohibits both the construction or the commencement of construction of any "wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures" in navigable waters of the United States, and the excavation or the filling in of any navigable waterway of the United States, except on recommendation by the Chief of Engineers and authorization by the Secretary of the Army. Citizens Committee for the Hudson Valley v. Volpe, 425 F.2d 97, 100 n.1 (1970).
2. The New York Department of Transportation planned to place approximately 9,500,000 cubic yards of fill, bound by a rock wall, along a portion of the Hudson River's bank. The fill was to extend, at its widest point, some 1,300 feet into the river. \textit{Id.} at 100.
3. Plaintiffs argued that a dike and a causeway would be constructed, and that, therefore, section 9 of the Rivers and Harbors Appropriation Act, 33 U.S.C. § 401 (1964), was the applicable section. This section prohibits the construction of any "bridge, dam, dike, or causeway" in any navigable river of the United States, unless the consent of Congress has been given, and the plans have been approved by the Chief of Engineers and the Secretary of the Army. \textit{Id.}
5. Approval by the Secretary of Transportation is required where construction of a causeway is proposed by virtue of a provision of the Department of Transportation Act, 49 U.S.C. § 1655(g)(6) (Supp. V, 1970), which transferred certain powers of the Secretary of the Army, including those under section 401 of the Rivers and Harbors Act, to the Secretary of Transportation.

(729)
not have standing to bring the action. The district court disagreed with both of defendants' contentions, and granted the relief sought by plaintiffs. The Court of Appeals for the Second Circuit affirmed, holding inter alia, that plaintiffs' public interest in environmental resources afforded them standing to challenge administrative agency action allegedly injurious to that public interest. Citizens Committee for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970). In the second case, plaintiff, the same conservation organization as in Citizens Committee, brought suit alone requesting that the proposed issuance of permits by the Secretary of Agriculture to Walt Disney Productions, Inc., for the purpose of constructing a large-scale commercial-recreational development within the Sequoia National Forest, be enjoined as being illegal and in excess of the Secretary's authority, and that the Secretary of the Interior be enjoined from issuing a permit for the construction of electrical transmission lines through park land. Plaintiff also sought a declaratory judgment of the illegality of the proposal by the Secretary of the Interior to allow the State of California to construct a new road through Sequoia National Park. Defendants contended that plaintiff did not have standing to sue, and that, in any event, they had the necessary authority to perform those acts sought to be enjoined by the plaintiff. The district court disagreed with the defendants and granted a preliminary injunction. However, the Court of Appeals for the Ninth Circuit reversed, holding that plaintiff's environmental concern, without the show-

7. The Secretary of Agriculture purported to act pursuant to his authority under the Organic Administration Act of 1897, 16 U.S.C. § 551 (1964), which gives the Secretary authority to make rules and regulations to regulate the occupancy and use of national forest lands, and to preserve the forests on those lands from destruction. Sierra Club v. Hickel, 433 F.2d 24, 28 (1970).
8. Disney submitted a proposal to the Forest Service concerning the development of an all-year recreational project in the Mineral King Valley located in the Sequoia National Forest in California. The Disney proposal was accepted, and Disney was given a special permit to make studies for a master plan, which, when submitted, was accepted for implementation, and was the subject of the instant dispute. Id. at 27.
9. Plaintiff contended that the Secretary of Agriculture exceeded his authority in approving Disney's master plan, specifically attacking the Secretary's proposal to issue a thirty-year term permit for an eighty acre parcel of land on which construction of improvements, such as hotels, pools, and parking lots was to begin, and his proposal to issue a revocable permit for additional land (about 13,000 acres) on which would be constructed such improvements as ski lifts, trails, and sewerage treatment facilities. Id.
10. The Secretary of the Interior claimed authority to act under 16 U.S.C. § 5 (1964), which permits the laying of electrical transmission lines within national park lands, if such lines do not interfere with the public interest. Plaintiff contended that section 5 is controlled by 16 U.S.C. § 45(c) (1964), which deals specifically with Sequoia National Park, and prohibits the issuance of any permit for electrical transmission lines without specific authority from Congress. Id.
11. The Secretary claimed authority for this action under 16 U.S.C. § 8 (1964), which permits the construction of new access roads into national parks generally. The state was to construct a new access road to Mineral King Valley, as the former route was allegedly substandard. This new highway was to be 20.4 miles long, of which 9.2 miles would cross Sequoia National Park. Id.
ing of a more direct legally protected interest, was not sufficient to grant the Club standing to challenge administrative agency action. *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970).

The major issue facing both courts, upon which they apparently disagreed, was whether or not a private conservation organization had standing to challenge administrative agency action.13 Prior to 1940, the general rule regarding standing was that one was entitled to sue only if he was protecting a substantive legal right.14 Then in 1940, the Supreme Court decided *FCC v. Sanders Bros.*,15 in which the Sanders', owners of a competing radio station, were permitted to appeal a Federal Communications Commission decision granting a broadcast license to another radio station, even though no legal right of the Sanders' was involved. The Court emphasized that the possible economic harm which would result from legal competition, although not relevant to the decision on the merits, was sufficient to afford the plaintiffs standing for the purpose of litigating the public interest in FCC decisions.16 However,

13. The *Citizens Committee* court was faced with two other issues. The first issue was whether or not the court had subject matter jurisdiction. Applying sections 702, 704, and 706, of the Administrative Procedure Act § 10, 5 U.S.C. § 701 et seq. (Supp. V. 1970), the court held that it did have the power to judicially review this act of the Army Corps of Engineers, even though the statute pursuant to which the agency acted, The Rivers and Harbors Appropriation Act, 33 U.S.C. § 401 et seq. (1964), does not specifically provide for judicial review. 425 F.2d at 101-02.

The second collateral issue was a constitutional argument raised by plaintiffs. Their contention was that three delegations of authority to the Commissioner of the Department of Transportation of the State of New York combined to constitute an abdication of legislative responsibility for construction of the expressway, thus violating due process. These constitutional arguments were found to be without merit by the district court. 302 F. Supp. at 1093-94. This finding was affirmed by the circuit court. 425 F.2d at 106-07.

The *Sierra Club* court did consider the issue of the merits, although in view of the fact that it held that plaintiff did not have standing to contest the merits, it need not have done so. 433 F.2d at 33-38.


15. 309 U.S. 470 (1940).

16. This doctrine was further clarified by *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942), where it was said that "these private litigants have standing only as representatives of the public interest" (emphasis added).

Standing to appeal agency decisions under the *Sandra-Scripps-Howard doctrine* was reconciled with the constitutional requirement of a case or controversy, U.S. Const. art. III, § 2, in *Associated Indus. v. Ickes*, 134 F.2d 694 (2d Cir. 1943), vacated as moot, 320 U.S. 707 (1943). Discussing the case or controversy requirement, Judge Frank found that:

In a suit in a federal court by a citizen against a government officer, complaining of alleged past or threatened future unlawful conduct by the defendant, there is no justicable "controversy," without which, under article III, § 2 of the Constitution, the court has no jurisdiction, unless the citizen shows that such conduct or threatened conduct invades or will invade a private substantive legally protected interest of the plaintiff citizen; such invaded interests must be either of
the Court did not consider the question of standing when there was no threat of substantial economic injury in fact to the one challenging an agency decision.\(^\text{17}\)

Subsequently, in *Scenic Hudson Preservation Conference v. FPC*,\(^\text{18}\) the Second Circuit seemed to expand the injury in fact concept by holding that a conservation organization's special interest in preserving the scenic, recreational, and historical values of an area made it an aggrieved party when that interest was allegedly disregarded by agency action, thus giving it standing to appeal an action of the Federal Power Commission under section 313(b) of the Federal Power Act.\(^\text{19}\) By recognizing that the case or controversy requirement of the Constitution\(^\text{20}\) does not necessarily require a personal legal or economic interest before one can be "aggrieved" by agency action,\(^\text{21}\) the *Scenic Hudson* court became

a "recognized" character, at "common law" or a substantive private legally protected interest created by statute.\(^\text{22}\)

134 F.2d at 700. However, he reasoned that the constitutional requirement was met when a government official, such as the Attorney General, challenged the constitutional or statutory authority of another official's action, and that Congress could therefore enact a statute conferring similar authority on non-official private citizens so that persons so authorized could bring suit as "private Attorney Generals," thus fulfilling the controversy requirement without actually litigating a personal legally protected right. *Id.* at 794. See K. Davis, *Administrative Law Text* § 22.05 (1959).

17. The early cases limited the Sanders-Scripps-Howard doctrine, employing its test to satisfy standing requirements only where the case involved some direct, substantial threat of economic harm. See, e.g., American Lecithin Co. v. McNutt, 155 F.2d 784 (2d Cir. 1946); United States Cane Sugar Refiners' Ass'n v. McNutt, 138 F.2d 116 (2d Cir. 1943).

However, subsequent decisions allowed intervention upon a showing of a remote or indirect economic threat. This indicates that the economic injury in fact test was being liberalized and would be restrictively applied only where the parties seeking to intervene had no real economic interest to protect. See, e.g., California v. FPC, 353 F.2d 16 (9th Cir. 1965); Sunray DX Oil Co. v. FPC, 351 F.2d 393 (10th Cir. 1965); Lynchburg Gas Co. v. FPC, 336 F.2d 942 (D.C. Cir. 1964); Philco Corp. v. FCC, 257 F.2d 656 (D.C. Cir. 1958); Seaboard & W. Air Lines v. CAB, 181 F.2d 515 (D.C. Cir. 1950), cert. denied, 339 U.S. 963 (1950); Seatrain Lines, Inc. v. United States, 152 F. Supp. 499 (D. Del. 1957), aff'd per curiam, 355 U.S. 811 (1957). See also L. Jaffe, *Judicial Control of Administrative Action* 257-85 (1965); *Keller, The Law of Administrative Standing and the Public Right of Interven* , 21 Fed. Com. 8, B.J. 134 (1967).


21. In reaching its decision, the *Scenic Hudson* court stated:

In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of "aggrieved" parties under § 313(b). We hold that the Federal Power Act gives petitioners a legal right to protect their special interests.

354 F.2d at 609 (emphasis added).

one of the first courts to clearly depart from the traditional notions of standing. 22

Subsequent cases have seemingly extended the rationale employed in *Scenic Hudson* by predicating standing upon the recognition that the right of intervention in, or appeal from, agency decisions, which previously had been vested in those parties protecting legal or economic interests, may also be vested in representative groups of the general public seeking the protection of other interests. 23 In *Road Review League v. Boyd*, 24 the United States District Court for the Southern District of New York found that the statute pursuant to which the action was brought made no specific provision for judicial review, 25 similar to those statutes involved in the instant cases 26 but unlike the statute in *Scenic Hudson*. The court held, however, that the provisions of the Administrative Procedure Act 27 were sufficient to manifest the congressional intent that conservation organizations, as well as other citizens' groups, were to be considered "aggrieved" by agency action allegedly disregarding their interests even though the particular act pursuant to which that agency acted did not contain a provision relating to who could challenge a decision of the agency. 28

In *Citizens Committee for the Hudson Valley v. Volpe*, 29 the court faced the crucial and difficult issue of standing 30 which in this particular

22. There are prior cases which are cited as being based neither on legal nor economic grounds, but in reality these cases involved the protection of legal or economic rights, thus fitting within the traditional theories. See Henderson v. United States, 339 U.S. 816 (1950); Behchick v. PUC, 287 F.2d 337 (D.C. Cir. 1961); Pollak v. PUC, 191 F.2d 450 (D.C. Cir. 1951), rev'd on other grounds, 343 U.S. 451 (1951). See also Parker v. Fleming, 329 U.S. 531 (1947); Houston v. CAB, 317 F.2d 158 (D.C. Cir. 1963); Reade v. Ewing, 205 F.2d 630 (2d Cir. 1953).

23. One of the leading cases in this area is United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), where various citizen groups were permitted to intervene in a television broadcast license renewal hearing. Feeling that the traditional theories of legal or economic injury, or, in FCC decisions, electrical interference, were not the exclusive grounds for granting standing, and that Congress did not intend to limit standing to those theories, the court held that representatives of an appreciable segment of the listening public had standing to litigate the public interest. See Keller, *The Law of Administrative Standing and the Public Right of Intervention*, 21 Fed. Com. B.J. 134 (1967).


29. 425 F.2d 97 (2d Cir. 1970).

30. The Supreme Court has observed that the law of standing is a "complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations." United
case ultimately turned upon the interpretation of the language "person" . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute" contained in section 702 of the Administrative Procedure Act. The Citizens Committee court, relying on the Scenic Hudson precedent as it was interpreted and extended by Road Review League, reasoned that plaintiffs' public interest in the resources and beauty of the threatened area was a sufficient interest to establish their standing as "persons aggrieved" within the "relevant" statute — the Rivers and Harbors Act.

To further substantiate its conclusion that plaintiffs had standing, the Citizens Committee court relied upon the Department of Transportation Act indicating that because it related to causeways, which were the subject of the instant dispute, and evidenced an environmental concern, it was also a "relevant" statute under section 702 of the Administrative Procedure Act. Moreover, the court also recognized that Congress had specifically evidenced an environmental concern for the Hudson Valley's scenic and historic values by enacting a resolution stating that the "Hudson River Basin contains resources of immense economic, natural, scenic, historic, and recreational value to all the citizens of the United States." 38

Similarly, one of the administrative regulations pertaining to the Corps' authority to issue the disputed filling and dredging permit specifically recommends that the environmental aspects of an area be taken into account.

31. 5 U.S.C. § 702 (Supp. V, 1970), provides in pertinent part:
   A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Similarly, the district court in the instant case found that there was a common feeling evident in Scenic Hudson and Road Review League, indicating that:
if the statutes involved in the controversy are concerned with the protection of natural, historic, and scenic resources, then a congressional intent exists to give standing to groups interested in these factors and who allege that these factors are not being properly considered by the agency.
302 F. Supp. at 1092.
36. 49 U.S.C. § 1653(f) (Supp. V, 1970), states that it is a national policy to preserve the natural beauty of government parklands and historic sites. Thus, plaintiffs were "aggrieved" within the meaning of the Transportation Act when this national policy was disregarded by the agency.
consideration before a permit should be issued. Thus, the court concluded "that the public interest in environmental resources — an interest created by statutes affecting the issuance of this permit — is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest." 39

In Sierra Club v. Hickel, 40 like Citizens Committee, the court concerned itself with the issue of standing. In an effort to distill some guidelines from prior decisional law and the Administrative Procedure Act for determining whether a particular individual or group has alleged an interest sufficient to establish standing, the Sierra Club court focused upon the test set forth in Association of Data Processing Service Organizations v. Camp. 41 This test determines that the first inquiry related to the question of standing is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise. 42 Citing this test as the controlling principle, the Ninth Circuit concluded that since "[t]here is no allegation in the complaint that members of the Sierra Club would be affected by the actions of defendants-appellants other than the fact that the actions are personally displeasing or distasteful to them" 43 plaintiffs did not establish the interest necessary to give them standing. 44

In reaching its decision the Sierra Club court attempted to distinguish previous decisions, including Citizens Committee, primarily upon their

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39. 425 F.2d at 105.
40. 433 F.2d 24 (9th Cir. 1970).
42. Id. at 152. The court elaborated further upon this test by stating that: "The question of standing ... concerns ... whether the interest sought to be protected by the complaint is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. ... That interest, at times, may reflect "aesthetic, conservational, and recreational" as well as economic values."

43. 153-54 (emphasis added).

44. Plaintiff alleged that its conservation interests would be vitally affected and aggrieved by the proposed acts of the Secretaries, and particularized those acts it considered to be in excess of authority and statutory jurisdiction, and an abuse of administrative discretion. See notes 7, 9, 10, & 11 infra. Encompassing these arguments was the allegation that the development would permanently destroy the value of the natural resources of the area, thereby causing irreparable harm to the public interest. 433 F.2d at 27-28. However, the court concluded that: "such club concern without a showing of more direct interest can [not] constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all of the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority."

433 F.2d at 30.
facts rather than upon the legal principles espoused. For example, the
court distinguished Scenic Hudson Preservation Conference v. FPC,\textsuperscript{45} on the ground that the statute involved in that case specifically conferred
upon the plaintiffs substantive legally protected rights, whereas in the
instant case, no such statute was applicable.\textsuperscript{46}

However, it is submitted that the court's distinction of Scenic Hudson
fails to be persuasive in view of the interpretation and expansion of the
Scenic Hudson rationale by subsequent decisions. Neither the statute
involved in Road Review League\textsuperscript{47} nor the one in Citizens Committee\textsuperscript{48}
contained any specific provision conferring substantive legal rights on
persons allegedly aggrieved by agency misconduct related to environmental
concerns. Similarly, the court in Powelton Civic Home Owners Associa-
tion v. Department of Housing and Urban Development,\textsuperscript{49} granted the
plaintiffs standing in the absence of specific statutory language so pro-
viding.\textsuperscript{50} Rather, in all three cases the courts applied the provisions of
the Administrative Procedure Act\textsuperscript{51} to establish a basis for standing. Thus,
it would appear that whenever the statute involved does not have a specific
standing provision the court should look to section 702 of the Adminis-
trative Procedure Act to determine whether the plaintiff has standing. It
is submitted, therefore, that the Sierra Club court apparently misconstrued

\begin{footnotesize}
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\item 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).
\item The Sierra Club court noted that section 313(b) of the Federal Power Act,
16 U.S.C. § 825(1)(b) (1964), gave standing to the Scenic Hudson plaintiffs, see
note 21 supra, but found that in the instant case the Organic Act of the National Park
Service, 16 U.S.C. § 1 et seq. (1964), had no similar provision which would give
these plaintiffs a legally protected right. 433 F.2d at 30.
\item In Powelton a civic organization representing citizens who would be dis-
placed by a federal urban renewal project was granted standing under the National
Scenic Hudson and Road Review League to determine that the Housing Act was the
"relevant" statute conferring a protected legal interest on plaintiffs, thereby giving
them standing under section 702 of the Administrative Procedure Act. The Powelton
court concluded:

The import of the Scenic Hudson case [and its interpretation in Road Review
League] is that neither economic injury nor a specific, individual legal right are
necessary adjuncts to standing. A plaintiff need only demonstrate that he is an
appropriate person to question the agency's alleged failure to protect a value
specifically recognized by federal law as "in the public interest"; he may then
invoke judicial scrutiny of the agency's performance in protecting — or
failing to protect — that specific value. He has standing to ask whether the
agency action is violative of the public interest.

284 F. Supp. at 820 (emphasis added). Thus, although the Housing Act does not
specifically grant review or standing to public representatives alleging violations
of that act, the Powelton court granted standing based on prior precedent.

However, the Sierra Club court attempted to distinguish Powelton as being
based on a statute conferring substantive legal rights on plaintiffs. It grounded this
discrimination on the following statement by the Powelton court:

[\textit{I}f I\textit{t} are of the opinion that the plaintiffs also have standing in the more
traditional sense: they have substantive legal rights conferred by the National
Housing Act. They have private individual legal rights; and they are the
appropriate representatives of legal rights conferred by the Housing Act on the
general public.]

Id. at 821.

\end{enumerate}
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these recent decisions as well as disregarded the legislative intent in enacting section 702, where it was concluded that the section did not apply in this situation and did not change the existing law of standing. Moreover, it is inconceivable that the precedential value of Scenic Hudson can be dispensed with by such a tenuous factual distinction.

With respect to the Citizens Committee case, as well as Parker v. United States, Scenic Hudson, and Road Review League, the Sierra Club court, although recognizing that these decisions granted standing to conservation groups (including the Sierra Club) to challenge agency action allegedly infringing upon natural resources, distinguished them on the factual basis that local residents and groups were joined in those actions, whereas in the instant action the Sierra Club was the sole plaintiff.

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52. See The Reports of the Senate and House Committees on the Judiciary, S. Doc. No. 248, 79th Cong., 2d Sess. 185, 233 (1946). See also Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 872 (D.C. Cir. 1970), where it was stated that: in spite of the fact that the Supreme Court has not yet chosen to hold that the Administrative Procedure Act applies to all situations in which a party who is in fact aggrieved seeks review, regardless of a lack of legal right or specified statutory language, it is clearly the intent of that Act that this should be the case. (Emphasis added).

53. The Sierra Club court relied on the concurring opinion of Judge (now Chief Justice) Burger in National Ass'n of Securities Dealers v. SEC, 420 F.2d 83, 104 n.5 (D.C. Cir. 1969), cert. granted, 397 U.S. 986 (1970), wherein he stated: Although the review provisions of the APA were not meant to retard the judicial development and adaptation of the law of standing, it does not establish an independent right to review absent judicially articulated notions of "legal wrong" of "adversely affected or aggrieved . . . within the meaning of any relevant statute."

But see note 52 supra for a different conclusion as to the impact of the Administrative Procedure Act.

54. 307 F. Supp. 685 (D. Colo. 1969). The Parker court stated that, although there were no provisions for review in the applicable statutes — the Multiple-Use Sustained-Yield Act, 16 U.S.C. § 528 et seq. (1964), and the Wilderness Act, 16 U.S.C. § 1131 et seq. (1964) — these statutes were "designed to protect the public interest in the preservation of the scenic and recreational aspects of certain public lands." 307 F. Supp. at 687 (emphasis added). The Parker court thus held: [P]laintiffs are advancing the public interest; also they have special interest in the values which Congress sought to protect by enacting the . . . statutes. We conclude that these statutes confer on groups . . . such as the plaintiffs the status of "aggrieved persons" (within the provisions of the Administrative Procedure Act, when the relevant statutes are violated by an administrative agency.)

Id.

55. The court stated that insofar as Citizens Committee indicated that the Sierra Club had standing within the "private Attorney Generals" rule expounded in Associated Industries, see note 16 supra, this court disagreed. The Sierra Club court felt that there was no statute present in Citizens Committee or in the instant case which conferred standing on the Sierra Club, or groups like it, to challenge administrative agency action. 433 F.2d at 33 n.9.

It is suggested, however, that the Organic Act of the National Park Service, 16 U.S.C. § 1 et seq. (1964), is the "relevant statute" in the instant case which may have given plaintiffs a legally protected right, although not expressly stated, to challenge the alleged agency misconduct. This Act states that: [T]he National Park Service . . . shall promote and regulate the use of . . . national parks . . . by such means and measures as to conform to the fundamental purpose of the said parks . . . which purpose is to preserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. § 1 (1964) (emphasis added). It is submitted that this language is sufficient to manifest the congressional intention that the conservational aspects of national parklands may give rise to a legally protectable right in certain persons alleging violations of such statutes.
This distinction, however, cannot seriously be posited as a meaningful one since had the courts in those cases wanted to do so, they could have quite easily denied standing to the conservation groups, while permitting the other plaintiffs to maintain their suits, and still have reached the same conclusion on the merits.\textsuperscript{56} Furthermore, it is submitted that the respective failures of these courts to exclude such groups cannot be considered as mere oversights on their part. Indeed the Citizens Committee court explicitly noted the distinction between the local citizens involved and the clubs when it stated:

Two of the plaintiffs (the Citizens Committee and the Sierra Club) made no claim that the proposed Expressway or the issuance of the dredge and fill permit threatened any direct personal or economic harm to them. Instead they asserted the interest of the public in the natural resources, scenic beauty and historical value of the area immediately threatened with drastic alteration, claiming that they were "aggrieved" when the Corps acted adversely to the public interest.\textsuperscript{57}

On the basis of this asserted interest the Second Circuit granted all plaintiffs standing.\textsuperscript{58} It is further submitted that the Ninth Circuit, although suggesting possible factual distinctions, clearly rejected this basis as a sufficient interest when it denied the Sierra Club standing. By requiring an assertion that the Club's "property will be damaged, that its organization or members will be endangered or that its status will be threatened"\textsuperscript{59} by agency action, the Sierra Club court apparently is reverting to the legal interest test and the economic injury in fact criterion postulated by the Sanders court in 1940.\textsuperscript{60}

\textsuperscript{56} Indeed, in United Church of Christ v. FCC, 359 F.2d 994, 1006 (D.C. Cir. 1966), the court stated that:

The usefulness of any particular petitioner for intervention must be judged in relation to other petitioners and the nature of the claims it asserts as its basis for standing.

Thus, this court held that not all petitioners had standing, and still reached a decision on the merits. It is difficult to comprehend why the courts in all of the above cases did not distinguish between the various plaintiffs and grant standing only to those alleging economic harm, if they had deemed it necessary to do so before reaching a decision on the merits.

\textsuperscript{57} 425 F.2d at 102.

\textsuperscript{58} The court granted all plaintiffs standing even though the representatives of the Village of Tarrytown were the only plaintiffs to allege economic injury as their basis for standing. They claimed that there would be a substantial loss of tax revenues and interference with the urban renewal project already begun. Thus, the Tarrytown representatives' basis for standing was substantially the same as that alleged in Scenic Hudson. There, the towns that were co-petitioners were afforded standing because the proposed electrical lines would cause them economic injury in fact in the form of a decrease in the value of publicly held land, a reduction of tax revenues, and substantial impairment of future community planning. See also Pittsburgh v. FPC, 237 F.2d 741 (D.C. Cir. 1956).

\textsuperscript{59} 433 F.2d at 30.

\textsuperscript{60} See note 15 supra and accompanying text. The suggestion that the Sierra Club court was concerned solely with the legal interest and economic injury tests is supported by the fact that the court considered Road Review League, United Church of Christ, and Data Processing, to be economic injury cases and therefore distinguishable from the instant case, thereby reconciling those holdings with the conclusions reached in the instant case.
In so holding, the Sierra Club court was not able to fulfill its apparent intended purpose — reconciliation of the various tests of standing employed by prior courts in order to find a unifying legal principle on which to predicate a single test for standing. Instead, the court made many factual distinctions, which, rather than clarifying the legal principles involved, merely proved that reconciliation on factual grounds is not possible in this area.

Nevertheless, the Sierra Club court's insistence that plaintiffs allege some identifiable injury is not totally inconsistent with the Data Processing requirement of alleging injury in fact. Furthermore, since Data Processing is the most recent Supreme Court pronouncement in this area, it must be looked to as the controlling authority. However, as Judge Hamley noted in his concurring opinion in Sierra Club, "the Supreme Court [in Data Processing] made it clear that the element of legal wrong need not be economic in nature, but may be aesthetic, conservational or recreational."61 It is this description of injury in fact which the majority in Sierra Club seemingly failed to apply, or perhaps misapplied, to the facts before them. This failure or misapplication, as the case may be, is not surprising in view of the conceptual difficulty of relating how a conservation group could be injured in fact, even aesthetically, when neither it nor its members are geographically located near the site of the threatened alteration of nature.62

61. 433 F.2d at 38.
62. The conclusion that the standing issue in Sierra Club was controlled by the fact of proximity of residence has been strongly buttressed by a recent decision of this same court. Alameda Conservation Ass'n v. California, Civil No. 22,961 (9th Cir., filed Jan. 19, 1971). There, plaintiffs, eight individuals and a conservation group, appealed dismissal of their action for failure to state a claim when they sought to enjoin the defendants from allegedly destroying the environmental values of San Francisco Bay by filling in portions thereof in violation of the Rivers and Harbors Appropriation Act, 33 U.S.C. § 401 et seq. (1964).

The circuit court reversed, with the three judges writing separate opinions on the issue of standing. Judge Trask, who authored the majority opinion in Sierra Club, thought that the four plaintiffs "who have property bordering the bay . . . and reside thereon" alleged a sufficiently personal interest and adverse affect thereon to be granted standing. Id. at 6. He thought that it was not necessary to reach the issue of standing with respect to the four remaining individual plaintiffs who did not reside near the bay. See United Church of Christ v. FPC, 359 F.2d 994 (D.C. Cir. 1966), note 56 supra. However, he would deny the conservation group standing because it "does not allege that it owns land bordering or near the bay at all [and] [i]t does not assert that it has any property interests of any kind real or personal which would sustain 'injury in fact,' . . ." Alameda Conservation Ass'n v. California, supra, at 4.

Judge Merrill thought that all eight individual plaintiffs acquired standing indicating that "injury in fact to individuals is threatened if their relationship to the bay, through proximity of residence or regularity of use, is such that in their normal activities injury to the bay . . . cannot but affect their aesthetic, recreational or environmental interests." Id. at 15. He agreed with Judge Trask that the conservation group should have been denied standing, but apparently on different grounds. He opined that standing requirements:

[A]ssure that litigation . . . will settle the matter as between the adversaries. The joining of an association as party can hardly give such assurance as to those it purports to represent since the rights of its members are not tendered for adjudication. Individual members are free to re-litigate. . . .

Id. at 16.

Judge Hamley would give all eight plaintiffs standing, because "[w]hile the properties upon which these four plaintiffs reside do not border the bay or its lagoons,
In sharp contrast to the factual setting in Sierra Club is that presented in Citizens Committee wherein the Second Circuit recognized that "[t]he Sierra Club is a national conservation organization with substantial membership . . . in the area of the (proposed) Expressway. . . ."  

Although there is broad language in Citizens Committee which would lead one to believe that the proximity of the members of the challenging Club to the proposed environmental alteration was not necessary to acquire standing, this is the only material fact which reconciles the seemingly disparate views of the Second and Ninth Circuits, as well as provides some standard for determining how one can be aesthetically injured in fact. It should be noted, however, that Citizens Committee was decided prior to Data Processing, and therefore any attempt to reconcile the two decisions on this basis is at best theoretical. Nevertheless, it does not appear that the conclusion of the Second Circuit is inconsistent with that of the Supreme Court. A brief analysis of the Data Processing opinion will show why this conclusion is valid. It appears that the Data Processing test is necessarily two-fold. The plaintiff's interest must have been injured in fact in some way, and the interest which has been injured or disregarded by the agency must be of a kind sought to be protected by the applicable statute. In view of the fact that some members of the conservation groups resided near the site of the proposed expressway involved in Citizens Committee and assuming that this fact was sufficient to establish an alleged injury in fact, then the group has met the first requirement. Similarly, the second requirement was specifically determined to be present when the Second Circuit concluded that "administrative as well as congressional concern for natural resources in the present exercise of federal authority is evident."  

Applying the same type of analysis to the Sierra Club case, although it is arguable that the second criteria is present, unless one takes the position that pure ideological interest in the preservation of our environment is sufficient to establish the requisite injury in fact, it is difficult to conclude that the Sierra Club was granted standing.  

63. 425 F.2d at 103.  
64. See note 39 supra and accompanying text.  
65. Injury in fact need not be economic in nature. See note 41 supra and accompanying text.  
66. See note 42 supra.  
67. 425 F.2d at 105.  
68. See note 55 supra.  
69. See Comment, The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution, 16 WAYNE L. REV. 1085 (1970), where the writer interpreted the holding of Data Processing to mean that:  

In short, whenever any person feels that a federal administrative agency has made a decision which does not "promote efforts to prevent or eliminate damage" to his legally protected interest in the environment he may, as an "aggrieved"
to conclude on the facts alleged by plaintiffs that they would suffer any injury in fact by the implementation of the proposed agency action because it was not alleged that any of the members of the Sierra Club resided near the site of the proposed development.

In conclusion, therefore, although the Second and Ninth Circuits apparently applied legal principles inconsistent with each other, and not entirely consistent with the Data Processing requirements, it is at least arguable that the conclusions reached by these courts are supportable in light of those requirements. However, it is submitted that the disparate results obtained in each case are reflective of the larger problem of defining the permissible limits of the Data Processing "injury in fact" test.70 To this end it is recommended that, having granted certiorari in Sierra Club,71 the United States Supreme Court, along with establishing general guidelines outlining the standing requirement in environmental lawsuits, specifically focus upon the question of environmental interest group standing.

Terry W. Knox

CONSTITUTIONAL LAW — CRIMINAL LAW — EVIDENCE OF PRE-TRIAL PHOTOGRAPHIC IDENTIFICATIONS AND OF LATER IN-COURT IDENTIFICATION BASED THEREON HELD INADMISSIBLE BECAUSE SUCH IDENTIFICATIONS WERE MADE WHILE DEFENDANT WAS IN CUSTODY AND IN THE ABSENCE OF DEFENDANT'S COUNSEL THUS VIOLATING DEFENDANT'S SIXTH AMENDMENT RIGHTS.

United States v. Zeiler (3d Cir. 1970)

Petitioner was convicted in the United States District Court for the Western District of Pennsylvania of three bank robberies in two sep-

person under the authority of Data Processing and the APA, bring an action in federal court to obtain judicial review of the administrative action. Id. at 1093-94 (emphasis added).

It is submitted that this interpretation of Data Processing is much too broad, and, in effect, eliminates any requirement of injury in fact in an environmental lawsuit, which would be an impermissible extension of Data Processing.

70. One question to be considered at this point is whether the ideological plaintiff concept can come within the ambit of this test. As was previously suggested, the concept of the ideological plaintiff does not seem to follow from the holding in Data Processing. See note 69 supra. The ideological plaintiff is necessarily one who has not been injured in fact; only his ideological beliefs have been infringed. It is submitted that to be injured in fact aesthetically, one must reside in or regularly use the area in relatively close proximity to the alleged harm, since to allow otherwise, would be to permit "any person" with any grievance to go into court to obstruct what might be a perfectly valid exercise of legitimate governmental power.

rate trials. The convictions were based, in part, upon evidence obtained in pre-trial photographic identifications by victims and upon in-court identifications by the same witnesses. Petitioner appealed his conviction on grounds that the photographic identifications made in the absence of counsel (1) violated his sixth amendment rights, and (2) made the witnesses incompetent for subsequent in-court identifications. The Third Circuit Court of Appeals reversed the convictions and remanded for a new trial, holding that identification testimony by eyewitnesses who had previously identified defendant through photographs exhibited to them after defendant was in custody and in the absence of counsel was constitutionally impermissible, and that the subsequent in-court identification was also inadmissible unless the government established by clear and convincing evidence that the witnesses were not influenced by the prior improper photographic identification. United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970).

Traditionally, an accused’s sixth amendment right to be represented by counsel was limited solely to the time of trial itself. However, in 1932, the United States Supreme Court in Powell v. Alabama expanded this right to include the period from arraignment to trial. The Powell Court held that an accused in a capital case has a right to assigned counsel as a necessary element of due process of law in order to advise

1. Prior to the first trial, Zeiler moved to suppress testimony of eyewitnesses on the grounds that it was incompetent as a result of publicity attending his arrest and arraignment. The motion was denied. United States v. Zeiler, 278 F. Supp. 112 (W.D. Pa. 1968). Subsequently, on August 1, 1967 Zeiler was indicted by a federal grand jury and charged with the perpetration of eleven bank robberies. Convictions for two of these robberies were handed down on January 23, 1968. Following the verdict, the defendant’s oral motion for a judgment of acquittal or for a new trial was denied. In a second trial concluded June 7, 1968 Zeiler and a codefendant were convicted of a single bank robbery. Following the second trial the defendant filed a motion for judgment of acquittal or for a new trial. The motion was denied. United States v. Zeiler, 296 F. Supp. 224 (W.D. Pa. 1969).

On June 23, 1967 William Zeiler was arrested, and three days later counsel was appointed to defend him. On July 6, 1967 a lineup was held attended by the accused’s counsel and fifty persons who had witnessed the various robberies. At trial it became apparent for the first time that, after Zeiler had been taken into custody and after counsel had been appointed to defend him but before the corporeal lineup was held, the FBI had privately confronted the witnesses with a series of photographs for identification.

2. U.S. Const., amend. VI reads in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, ... and to have the assistance of counsel for his defense.”

3. 287 U.S. 45 (1932). After Powell, the Court in Johnson v. Zerbst, 304 U.S. 458 (1938), required the government to furnish counsel to indigent defendants in federal prosecutions.

4. 287 U.S. at 71. At first, the right was not required in state court proceedings. In Betts v. Brady, 316 U.S. 455 (1942), the Court held that the right to counsel applied only to proceedings in a federal court and that the due process clause of the fourteenth amendment did not incorporate the specific guarantees of the sixth amendment. Betts appeared unshakeable until Hamilton v. Alabama, 368 U.S. 52 (1961), in which the Court ruled that, at least in Alabama, an arraignment in a capital case was a critical stage in the proceedings against the accused and therefore, the right to counsel attached. Betts was later specifically overruled by Gideon v. Wainwright, 372 U.S. 335 (1963), which held that the right to counsel was afforded to defendants in state criminal proceedings. Finally, to remove all doubt as to their intention, the Supreme Court in White v. Maryland, 373 U.S. 59 (1963), held that a preliminary hearing under Maryland law was as “critical” a stage as arraignment under Alabama
the accused of his rights and to prepare his defense. Later, in Escobedo v. Illinois, the right to counsel was held to extend to the pre-indictment stages of the criminal process.

In 1967, the Supreme Court further expanded the right to counsel concept in United States v. Wade where it decided that the right extends to pre-trial and post-indictment identification procedures. In Wade, the Court held that such confrontations of an accused for purposes of identification are "critical stages" in the proceedings and that the presence of counsel at this stage would promote fairness through minimizing the possibility of suggestion and by providing defense counsel with enough information to assure a full hearing at trial on the issue of identification. However, the Court also made it clear that failure to provide counsel at a pre-trial corporeal identification would not result in automatic exclusion of subsequent in-court identification evidence, if the witness could identify the defendant under circumstances in which it could be shown that the lineup did not unduly influence him. Moreover, the Wade Court indicated that the failure to provide counsel at the lineup under such circumstances would be considered harmless error and the in-court identification would thus be admissible.

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law and, therefore, defense counsel must be present. For a general discussion of the right to counsel in criminal proceedings, see The Supreme Court, 1962 Term, 77 Harv. L. Rev. 103 (1963); Comment, Waiver of the Right to Counsel in State Court Cases: The Effect of Gideon v. Wainwright, 31 U. Chi. L. Rev. 591 (1964).


6. During this critical period the accused must also be warned of his constitutional rights to remain silent and to consult with his lawyer. Id. This position was later clarified in Miranda v. Arizona, 384 U.S. 439 (1965), where the Court held that during a custodial interrogation or whenever an accused is deprived of his freedom in any significant way, the defendant must be informed in "clear and unequivocal" terms of his constitutional rights including his right to have a lawyer appointed to represent him.


8. Hamilton v. Alabama, 368 U.S. 52 (1961). White v. Maryland, 373 U.S. 59 (1963), and Escobedo v. Illinois, 378 U.S. 478 (1964), established the principle that any stage before trial could be regarded as "critical" for the purpose of requiring the assistance of counsel if significant rights, which counsel could help to protect, might be jeopardized or lost. See note 4 supra.


10. 388 U.S. at 239-43. See Gilbert v. California, 388 U.S. 263 (1967). The Gilbert Court noted that where the testimony of an identifying witness is the direct result of an illegal lineup, a per se exclusionary rule is the only effective sanction. See also Wong Sun v. United States, 371 U.S. 471, 488 (1963); Nardone v. United States, 308 U.S. 338, 341 (1939). On the problem of establishing the independent basis of an in-court identification, see Comment, Due Process Considerations in Police Show-Up Practices, 44 N.Y.U. L. Rev. 377, 390 (1969); Comment, Right to Counsel at Police Identification Proceedings: A Problem in Effective Implementation of an Expanding Constitution, 29 U. Pitt. L. Rev. 65, 77 (1967); 63 Nw. U. L. Rev. 251, 256 (1968). On the same day the Supreme Court of the United States decided Gilbert and Wade it also decided Stovall v. Denno, 388 U.S. 293 (1967), which held that the Wade case applied only to lineups occurring after the date of the opinion. A defendant, although not entitled to the application of Wade and Gilbert is entitled
The presence of the element of suggestion relied on by the *Wade* Court in reaching its conclusion was subsequently applied to pre-trial photo-identification in *Simmons v. United States*. In *Simmons*, the Court established a due process standard whereby convictions based on photo-identifications would "be set aside only if the identification procedure was so impossibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Since the petitioner in *Simmons* did not base his objections on his right to have counsel present, the Court relied exclusively on due process standards to determine the admissibility of the photographic identifications. However, subsequent defenses based on the *Simmons* rationale have usually been unsuccessful, and, as a result, most challenges to photographic identifications have relied on the right to have counsel present during the identification. Such challenges were grounded upon the argument that the inherent possibilities of suggestion existing at photographic identification and the attendant difficulties in reconstructing the details of such an identification for cross-examination purposes are such that the presence of counsel is necessary to assure fairness to the accused both during the identification and later at trial. However, prior to *Zeiler*, few courts had accepted these arguments and it was generally agreed that the proper

to relief in the event the confrontation conducted is so unnecessarily suggestive and conducive to inexorable mistaken identification that he is denied due process of law. See 81 HARV. L. REV. 178 (1968); 19 W. RES. L. REV. 410 (1967).

*Simmons* v. *United States*, 396 U.S. 293 (1969). Petitioners Simmons and Garrett together with William Andrews, were indicted and tried for the robbery of a Chicago savings and loan association. All three were found guilty and certiorari was granted to Simmons and Garrett. Simmons asserted that his pre-trial identification by means of photographs was so unnecessarily suggestive and conducive to misidentification as to deny him due process of law. After the robbery, but prior to arrest, witnesses had been shown a number of photographs. All of the witnesses identified Simmons from the photographs. Looking to the facts surrounding the identification and applying the due process standard as set out in *Stovall* v. *Denno*, 388 U.S. 293, 301-02 (1967), the Court concluded that Simmons' claim must fail.


12. 390 U.S. at 384.


test to be used was *Simmons* and that any prejudice resulting from the identification could easily be revealed by defense counsel upon cross-examination.18

In holding that an accused’s right to counsel includes counsel’s presence at photo-identifications, the Zeiler court reviewed the considerations which led the Supreme Court in *Wade* to guarantee the right to counsel at lineups and noted that these same considerations apply equally to photographic identifications conducted after the defendant is in custody.16 Thus, the conclusion in Zeiler rested upon two observations: (1) the inherent danger of suggestion17 which contributes to the possibility of mistaken identifications; and (2) the inability of defense counsel to reconstruct the manner in which the identification procedure was conducted.18

Regarding the first factor, the court recognized that while the use of photographs may eliminate or diminish some of the potential unfairness found in the lineup proceedings,10 such diminution of possible prejudice would be outweighed by the increased suggestive influences which inhere in the use of photographs.20 For example, the type of photograph may be a source of suggestive influence if the accused’s photo is markedly different from others with respect to pose, mounting, color, or age.21 Moreover, the possibility for suggestion increases if the physical characteristics of the suspect evident in the picture differ radically from those

display, concluded that the suspect has a right to counsel. See also Carmichel v. State, —— Nev. ———, 467 P.2d 108 (1970).

15. In United States v. Clark, 289 F. Supp. 610 (E.D. Pa. 1968), the United States District Court for the Eastern District of Pennsylvania recognized that photographic displays do present greater opportunities for prejudice than do other types of investigatory procedure; however, it concluded that any unnecessarily suggestive pre-trial procedure may be suppressed through cross-examination. See also Simmons v. United States, 390 U.S. 377 (1968); United States v. Conway, 415 F.2d 158 (3d Cir. 1969); United States v. Bennett, 409 F.2d 888 (2d Cir. 1969).

16. 427 F.2d at 1307.

17. An example of suggestion presented itself in the *Wade* case where one of the witnesses testified on cross-examination that before the lineup she saw Wade standing in a hall within sight of an FBI agent. 388 U.S. 218, 233-34 (1967). See also Gilbert v. California, 388 U.S. 263 (1967).

18. 427 F.2d at 1307. In United States v. Wade, the Supreme Court noted that: Insofar as the accused’s conviction may rest on a courtroom identification in fact the fruit of a suspect pre-trial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. 388 U.S. at 235. See Pointer v. Texas, 380 U.S. 400 (1965), where the Supreme Court held that the right granted to an accused by the sixth amendment to confront the witnesses against him, which includes the right of cross-examination, is a fundamental right essential to a fair trial.

19. An example of possible unfairness would be using persons who have marked differences in height.


of other subjects. These suggestive features will obviously have the effect of placing greater emphasis on the photograph of the suspect.

Additionally, direct suggestive comments or gestures by the police may also influence the witness's objectivity at a photo-identification. An accused's picture may be singled out by either pointing directly to the photograph of the suspect or by asking leading questions referring to one particular suspect which describes his physical characteristics. Even the most scrupulous police officer may unwittingly influence the identification by the manner in which he places the photographs before the witness or the order in which he hands them to him. Indeed, the accused's image may recur so often in a series of pictures that attention is automatically drawn to it. Suggestion may even result from the influence of one witness upon another if there are several witnesses present at the identification.

In addition to the finding that the dangers of suggestion inherent in a corporeal identification are equally prevalent in a photographic identification, the Zeiler court also found that the problem may be even greater in a picture identification. This finding is based upon the premise that while corporeal identifications are not completely reliable even under the best conditions, they are nevertheless considered superior to photographic identifications. This conclusion seems reasonable since photographs present a two dimensional image which is "frozen" and thus dissimilar to the living, moving subject originally viewed by the observer. Indeed, there is no question that the human mind is extremely susceptible to external suggestive influences and this susceptibility could result in the creation of nonexistent memories or in the alteration of

22. In Zeiler the identifying witnesses were confronted with eight photographs, five of different individuals and three of Zeiler. The pictures of the other men were police "mug shots"; those of Zeiler were ordinary snapshots. In addition, Zeiler was pictured wearing eyeglasses, as the actual perpetrator of the robbery had done. 427 F.2d at 1308. An analogous situation may present itself in a corporeal lineup where physical characteristics of the lineup participants differ.


24. See Williams & Hammelmann, supra note 23.


26. See P. Wall, supra note 21, at 74-77. The danger is increased, of course, if the police display only the picture of the individual who generally resembles the person he saw. Id. Also the chance of suggestion is increased if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Id. at 82-83.

27. Suggestion may have a greater effect if the witnesses' original observation of the suspect was impaired by poor conditions such as distance. Cf. Williams & Hammelmann, supra note 23, at 483. Emotional excitement may also leave a witness open to suggestion. Comment, supra note 23, at 554.

28. 427 F.2d at 1307.


30. See generally P. Wall, supra note 21. Frequently subsequent events will influence a witness's recollection of prior occurrences.
memories of existing events. Additionally, since juries give much more weight to the identification of a criminal defendant than to almost any other kind of evidence, it becomes apparent that photo-identifications may lead to an even greater number of misidentifications than corporeal identifications.

Regarding the second factor concerning the inability of defense counsel to effectively cross-examine the observing witnesses, the court rejected the argument that defense counsel would have an opportunity to attack the reliability of the photo-identification at trial by reconstructing on cross-examination any unfair situations which had previously occurred. This argument was similarly rejected by the Wade Court regarding corporeal identifications. It is submitted that the Zeiler Court was correct on this point since the inability of defense counsel to reconstruct the circumstances surrounding an identification is more acute in a picture identification because the defendant himself is not present. Furthermore, since the opportunity to reconstruct the possible suggestiveness and unfairness of the photographic identification is de minimus, the defendant has no meaningful opportunity to attack the credibility of the identifying witness. Despite this shortcoming, however, many courts have taken the position that the details of the photographic identification may be reconstructed at trial and any resulting prejudice vitiated by admitting the actual pictures used into evidence. While it does seem that the...

31. See E. Borchard, Convicting the Innocent, xiii (1932). See also M. Post, The Man Hunters 26 (1926).
32. See Comment, supra note 23, at 552.
34. 388 U.S. at 230. The Wade Court noted that neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. However, even if they were it is unlikely that they would detect the potential prejudice since they are not schooled in the practice. Moreover, emotional tension which accompanies a lineup may cause participants to be less observant. Beyond the inability of witnesses to detect suggestive influences at a corporeal lineup, an additional impediment is the physical conditions surrounding the conduct of the lineup. Id. at 230 n.13. In many situations, lights shine on the stage in such a way that the suspect cannot see the witnesses. See Gilbert v. United States, 366 F.2d 923 (9th Cir. 1966), cert. denied, 393 U.S. 985 (1968). In some, a one-way mirror is used and the suspect can neither see nor hear the witness. See Rigney v. Hendrick, 355 F.2d 710, 711 n.2 (3d Cir. 1965), cert. denied, 384 U.S. 975 (1966). As a result, “numerous defendants . . . are unable to ferret out suggestive influences in the secrecy of the confrontation.” 388 U.S. at 234–35.
35. 427 F.2d at 1307.
36. Obviously, nothing could be accomplished with more secrecy and, therefore, be more prejudicial than an identification without the suspect. Furthermore, “the out of court identification by photograph may never come to light since the defendant was not a participant therein.” 63 Nw. U.L. Rev. 251, 258 (1967). In Zeiler, the pre-trial identification did not come to light until after the trial had begun. 427 F.2d at 1306.
37. 427 F.2d at 1307.
credibility of the actual photographs might be established in this manner, it is submitted that this type of reconstruction would be ineffective since the possible prejudice at the time the photographs were displayed would still remain. Furthermore, since most witnesses "are [not] likely to be schooled in detection of suggestive influences," any attempt at reconstruction seems futile. Adequate recognition of the inherent suggestiveness in photo-identification and of the impossibility of accurately reconstructing the identification procedure at trial would seem to almost compel the Zeiler court's decision.

In addition to the above considerations, the instant holding was further grounded upon the proposition that the constitutional safeguards of Wade would be completely nullified if the police were able to privately confront witnesses with suggestive photographs prior to the lineup. However, the court's fear that the absence of counsel at photographic identifications would encourage the police to abuse the identification process seems somewhat misplaced in light of the fact that most authorities believe that the majority of improper identifications result from dangers inherent in all eye-witness identification rather than from deliberate police procedures designed to prejudice an accused. It seems that the major source of prejudice to the accused will flow from the fact that most physical identifications are preceded by a photo-identification. This sequence results in the inherent suggestiveness of the photo-identification procedures carrying forward to any subsequent identification at a lineup. It is very likely that a witness may base a physical identification upon his recollection of the accused's picture rather than photo-identification could be preserved and guidelines initiated and followed for these procedures, the presence of counsel would not be required.

40. 427 F.2d at 1307.
41. Id.
42. Id. See also United States v. Marson, 408 F.2d 644, 654 (4th Cir. 1968) (Winter, J., dissenting).
43. See p. 745 supra.
44. See Williams & Hammelmann, supra note 23, at 482. The Court in Wade also assumed that suggestive influence was not the result of police procedures intentionally designed to prejudice an accused. 388 U.S. at 235.

In England it would be regarded as most improper to show a photograph to a witness who is about to inspect a parade. See Williams & Hammelmann, supra note 23, at 484-85, for criticism of this practice. The practice of showing a suspect's picture to a witness prior to a lineup may be grounds for reversal. Rex v. Goss, 17 Crim. App. 196 (1923).

46. In State v. Galloway, 247 A.2d 104 (Me. 1968), a witness was shown fifteen or twenty photographs of various persons on two occasions but rejected all of them. On a third occasion she was shown two photographs of the accused and immediately identified him. Consequently, she was able to identify the suspect at a later corporeal confrontation. The Supreme Court of Maine noted that the witness was not prompted or assisted by the officers in her identification. However, the court failed to point out that inherent suggestion was, nevertheless, distinctly possible since the witness only viewed two pictures of the defendant.
upon an independent recollection formed at the time the crime was committed.\(^4\) In effect, the subsequent identification of the accused may merely show that the picture was a good likeness.\(^5\) Furthermore, a witness may be reluctant to contradict his prior identification at a subsequent lineup\(^6\) thus rendering the presence of counsel at the lineup a useless gesture, since the identification would already have been made.\(^7\) Thus, the foregoing could result in an unreliable corporeal identification even though the accused’s constitutional rights have been fully protected in accordance with \textit{Wade}.\(^8\)

After deciding that an accused must be afforded counsel during a pre-trial photo identification, the \textit{Zeiler} court addressed itself to the application of the exclusionary rule holding that: (1) evidentiary use of the improper photographic identification was to be excluded per se;\(^9\) and (2) in-court identification of the accused would be admissible only if the prosecutor could establish “by clear and convincing evidence” that the witnesses were not influenced by the prior photographic identification.\(^10\) This rule, it is submitted, is fair because it allows the prosecutor the opportunity to obtain an in-court identification when his case rests heavily on eye witness identification. The guidelines set forth in \textit{Wade} for determining the independence of in-court identifications when a corporeal lineup has been conducted could presumably be followed in determining the taint of a photographic identification. These guidelines include: (1) the prior opportunity to observe the alleged criminal act; (2) the existence of a discrepancy between any pre-lineup description and the defendant’s actual description; (3) any identification prior to the lineup of another person; (4) the failure to identify the defendant on a prior occasion; and (5) the lapse of time between the alleged act and the lineup identification.\(^11\)

\(^{47}\) In Simmons v. United States, 390 U.S. 377, 383-84 (1968), the Supreme Court noted that: Regardless how the initial misidentification comes about, the witness is apt to retain in his memory the image of the photograph rather than of the person actually seen. . . . See also Williams & Hammelmann, \textit{supra} note 23, at 486; Comment, \textit{supra} note 23, at 553-54.

\(^{48}\) Williams & Hammelmann, \textit{supra} note 23, at 484.

\(^{49}\) Id. at 482.

\(^{50}\) 427 F.2d 1307. Counsel will be able to observe any prejudice at these subsequent proceedings, but he will never be able to calculate completely all the prejudicial influence the previous photographic display had on the victim. It is this possible prejudicial proceeding which may ultimately determine the defendant’s identification, thereby violating his constitutional rights. For these reasons, some courts have prohibited an in-court identification which followed an unreliable photographic display. See United States v. Washington, 292 F. Supp. 284 (D.D.C. 1968); United States v. Trivette, 282 F. Supp. 720 (D.D.C. 1968).


\(^{52}\) 427 F.2d at 1307.

\(^{53}\) Id. at 1307-08. See p. 743 and note 10 \textit{supra}.

While these guidelines suggest that independent in-court identification is possible, doubts have been expressed concerning its practicability since a court can never know with any degree of certainty if the in-court identification is free of any taint.55 In fact, the four Justices who dissented in Wade56 were of the opinion that such a task was impossible.57

In the final analysis, whether such a burden is sustainable would appear to depend on the interpretation given to the "clear and convincing evidence" requirement. If the prosecutor is required to prove that the in-court identification is independent of the illegal lineup, to the extent that the "clear and convincing evidence" requirement approaches the reasonable doubt standard58 the exclusionary rule may very well be too harsh. Its seems that the prosecutor will have to prove a sequence of events prior to the photographic display which would have allowed the witness to make a correct identification without the taint of the photographic display. These events will probably include the opportunity the witness had to observe the suspect at the time of the crime as well as other situations tending to prove that the witness had knowledge of the identity of the defendant. However, since the technique of identification is most often employed in cases in which the witness views the suspect only for a short period of time and while in a condition of emotional stress, the likelihood that the prosecutor will meet this interpretation of the requirement would seem to be minimal. On the other hand, if the "clear and convincing evidence" requirement is only a question of probabilities, it would seem that the exclusionary rule becomes fairer for the prosecutor. However, by allowing the prosecutor to use this lower evidentiary standard to establish an untainted in-court identification, a suspect's rights may be jeopardized since the in-court identification may not be completely free of prejudice arising from the questionable photographic display.

Although the Zeiler court has determined that counsel's presence at the identification proceedings will aid in lessening the suggestiveness inherent in photo-identifications, the role that defense counsel will assume at the actual identification is not clear.59 Since identification procedures

56. 388 U.S. at 243.
57. Id. at 248, 250-51.
58. In Gilbert v. California, 388 U.S. 263 (1967), the Court expressed the view that the in-court identification should be free of the taint of the illegal lineup beyond a reasonable doubt. Id. at 274.
59. Many courts have been unwilling to extend the right to counsel to photographic identifications because they are of the opinion that the traditional role of counsel does not extend to proceedings where the defendant himself is not present. See United States v. Bennett, 409 F.2d 888, 889 (2d Cir. 1969) (the classical analysis of the assistance to be given by counsel does not include his presence when the prosecution is interrogating witnesses in the defendant's absence); United States v. Conway, 415 F.2d 158, 163 (3d Cir. 1969) (no form of confrontation); United States v.
do not violate a defendant's constitutional right against self-incrimination,\textsuperscript{60} it is certain that counsel could not prevent the photographic display,\textsuperscript{61} and it is questionable whether he could insist that the exhibition of photos be replaced by a more desirable procedure or accomplished in a less prejudicial manner.\textsuperscript{62} However, it would seem that counsel should be permitted to offer suggestions as to the methods used in the identification,\textsuperscript{63} and at least act as a passive observer.\textsuperscript{64} In the latter capacity, through the use of his knowledge of the procedure he would be able to reconstruct the circumstances of the identification at trial and question the credibility of the identifying witnesses through more effective cross-examination. Moreover, it seems clear that while his traditional role would be somewhat altered, counsel could nevertheless effectively preserve crucial rights of the accused.\textsuperscript{65}

Marson, 408 F.2d 644, 649 (4th Cir. 1968) (the rationale of \textit{Wade} and \textit{Gilbert} should not be extended to photographic identifications since one of the prime factors underlying those decisions was the presence of the accused).

But the traditional role of counsel is not to be so narrowly defined or to be given so much weight that it overrides the defendant's right to a fair trial. Since a corporeal lineup is a critical stage where the defendant is assured of his right to counsel, and since the same prejudice involved in such a lineup is present in a photographic identification, it would seem that the latter is also a critical stage which involves the substantial rights of the accused that should be protected by the "guiding hand" of counsel. \textit{See The Supreme Court, 1966 Term}, 81 Harv. L. Rev. 69, 181 (1967); Note, \textit{Lawyers and Lineups}, 77 Yale L.J. 390, 395 (1966); 43 N.Y.U.L. Rev. 1017, 1201 (1969); 23 Vand. L. Rev. 162, 166 (1969).

60. The fifth amendment privilege protects an accused from being compelled to testify against himself, or to provide the State with evidence of a testimonial or communicative nature. Schmerber v. California, 384 U.S. 757, 761 (1966). "[C]ompelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance." United States v. Wade, 388 U.S. 218, 222 (1967). A similar result would follow for a photographic display since photographs are really representations of individuals on a frozen surface.

61. Eight members of the Court in \textit{Wade} agreed that a lineup per se is not a violation of the right against self-incrimination and, consequently, until the rights of the accused are established, defense counsel cannot cite the lineup as a violation of the constitutional provision. With no authority to object to the lineup or a photographic display, a lawyer is powerless to act.

62. One of the underlying assumptions of the \textit{Wade} decision is that counsel's presence itself would have a prophylactic effect on police practices. However, if the police fail to conduct a substantially fair lineup or photographic display, whether intentional or otherwise, counsel could hardly compel the police to adhere to his standard of fairness in the light of the fact that the \textit{Wade} Court failed to even suggest what the role of counsel might be in averting possible prejudice. \textit{See} 43 N.Y.U.L. Rev. 1017, 1024 (1968) (counsel may not insist that the police adhere to his standards of fairness).

63. Nothing in Justice Brennan's opinion in \textit{Wade} seems to indicate that counsel may suggest possible alternatives to avoid prejudice or that the police have to listen to him. However, Justice White, in his dissenting opinion, noted that "... there is an implicit invitation to counsel to suggest rules for the lineup and to manage and produce it as best he can." 388 U.S. at 259.

64. Most commentators seem to agree that counsel will be allowed to function in this capacity. \textit{See Comment, The Right to Counsel During Pre-Trial Identification Proceedings -- An Examination}, 47 Nw. L. Rev. 740, 748-49 (1968); Note, \textit{Lawyers and Lineups}, 77 Yale L.J. 390, 396 (1967); 63 Nw. U.L. Rev. 251, 259 (1968) (raising a question of ethical problems counsel is faced with when he acts merely as an observer, and then as a witness at trial).

65. For a full discussion of the possible role of counsel at extra-judicial identifications and some alternatives to the counsel requirement, \textit{see Comment, supra} note 63,
Militating against the positive aspects of the protections afforded the accused are the practical problems of: (1) considerable delay preventing the early release of innocent suspects and delaying the commencement of a new investigation,66 and (2) impediment of the government's ability to investigate cases and apprehend suspects.67 Moreover, the Wade suggestion that substitute counsel be utilized to protect the suspect's rights where circumstances would not permit the accused to reach his lawyer immediately68 does not seem to adequately answer this problem since the defendant's rights might be compromised to the extent that inadequate preparation for trial results. Deficient preparation could occur particularly in situations where substitute counsel is required to take a more active part in the criminal process; for example, at interrogation proceedings. However, assuming that this consideration is accurate, it is submitted that substitute counsel still could provide the accused with effective protection during a photographic display in light of the fact that his primary role is that of a passive observer. His observations, if they were made with a focus to inherent prejudice,69 could be relayed to defendant's own counsel or presented at trial in order to aid in the reconstruction of the pre-trial identification procedure. Furthermore, Zeiler would not seem to impede the use of photo-identifications during investigation and apprehension since the court expressly limits its rule to points in time when the accused is already in custody.70

67. The Wade Court rejected this contention stating that:
   "To refuse to recognize the right to counsel for fear that counsel will obstruct
   the course of justice is contrary to the basic assumptions upon which this Court
   has operated in sixth amendment cases."
388 U.S. at 237-38.
68. 388 U.S. at 237. See Comment, supra note 63, at 754-55, for criticism of the idea of substitute counsel.
69. The Wade Court mentioned the possibility that substitute counsel might "serve important functions of contributing to the apprehension of offenders and of sparing innocent suspects the ignominy of arrest by allowing eye-witnesses to exonerate them. However, neither of these functions are fulfilled once the suspect has been taken into custody. Thus the Zeiler court recognized the importance of the use of photographs as an important tool in investigating unsolved crimes and apprehending suspects and at the same time effectuated a proper rule for police enforcement. In doing so, the court distinguished Simmons by noting that the photographic identification in that case occurred prior to arrest and was part of the investigation process. The Zeiler court did not specifically define the term custody; however, it is a distinct possibility that the court was using the term in the manner in which the Supreme Court used it in Miranda v. Arizona, 384 U.S. 436 (1966). There the term "custody" was defined to mean that a person was..."
Should the ultimate conclusion be reached that the police administration problems raised by Zeiler are insurmountable, it is submitted that there are alternative safeguards other than the presence of counsel that could guarantee fairness at photo-identifications.\textsuperscript{71} As suggested by the Wade Court, there might be no need to declare the pre-trial identification a critical stage if proper legislative or police standards of conduct concerning such identifications were in widespread use. Such standards could be monitored through employing a disinterested party to view the process and later presented in court, through conducting the proceedings before a judicial magistrate who could make it a matter of record, or through using sound and pictorial devices to facilitate later reconstruction.\textsuperscript{72} Creative use of effective guidelines with attendant enforcement procedures would provide a reviewable process in which the risk of suggestiveness could be eliminated and a record for defense counsel’s use preserved.

In conclusion, the Zeiler court has extended the criminal defendant’s right to counsel to an area of the criminal process relatively untouched since Wade. It is submitted that this is a necessary step because the inherent suggestiveness in photo-identifications is such that in the absence of other safeguards, the presence of counsel is required in order to insure the defendant’s right to a fair trial. Moreover, this extension of the right to counsel assures the accused that when a photo-identification precedes a corporeal lineup any prejudice occurring at the former will be detected, thereby preserving the constitutional rights afforded by Wade at the later lineup procedure. Indeed, when other state and federal courts are faced with the issue presented in the instant case, the Zeiler rationale will offer strong support for holding that the right to counsel must be afforded a criminal defendant at an in-custodial photographic identification.

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taken into custody or “deprived of his freedom of action in any significant way.” \textit{Id.} at 444.

\textsuperscript{71} 388 U.S. at 239. For a discussion of possible regulations which might be implemented for the photo-identification, see P. Wall, \textit{supra} note 21, at 73-85. For a similar discussion relating to line-up procedures, see Murray, \textit{The Criminal Lineup at Home and Abroad}, 1966 \textit{Utah L. Rev.} 610, 627-28.

\textsuperscript{72} \textit{See} 3 J. Wigmore, \textit{Evidence} § 786(a)(B)(4) (3d ed. 1940). Wigmore suggests the application of science to police methods in the application of a “talking film” in the identification of arrested persons. He suggests that one hundred talking-pictures of men and women in a variety of occupations, race-origins, ages, etc., and in a variety of dress and poses would be prepared in advance. The picture would last two minutes, in the last minute the suspect would read aloud a standard uniform passage. The films would be classified according to physical features. The person arrested would be filmed in a similar manner. An electronic device would register the response of the witness who would view twenty-five pictures and the degree of positiveness in the response. Later, this record could be used to cross-examine the witness.

One author has suggested that this procedure would be less expensive than the requirement of counsel at the identification process. \textit{See Comment, supra} note 33, at 852. This type of procedure would also eliminate the possibility of delay in releasing innocent suspects and commencing a new investigation.
CONSTITUTIONAL LAW — EQUAL PROTECTION — "CHOICE" OF FINE OR IMPRISONMENT IS NO CHOICE AT ALL FOR AN INDIGENT OFFENDER — DEFAULT IMPRISONMENT OF INDIGENTS CONSTITUTES INVIDIAUS DISCRIMINATION, ON THE BASIS OF WEALTH, IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

In re Antazo (Calif. 1970)

Petitioner was indicted on several counts of arson and conspiracy. ¹ He entered a guilty plea to the arson charge, received a three-year suspended sentence, and was ordered to pay a fine of $2,500, plus a penalty assessment of $625, or, in lieu of payment thereof, to be imprisoned in the county jail one day for each $10.00 unpaid. ² Because he was an indigent, ³ petitioner could not pay the fine and thus was incarcerated. ⁴ He petitioned for a writ of habeas corpus, alleging that the California Penal Code sections which authorized the fine and penalty, and the imprisonment in default thereof, ⁵ were unconstitutional as applied to him, since they resulted in his imprisonment solely because of his indigency. The Supreme Court of California granted the writ, ⁶ holding that imprisonment of an indigent because of his inability to pay the fine imposed upon

2. After entering his guilty plea petitioner was released on his own recognizance and while he remained at large he testified for the prosecution at the trial of his alleged co-conspirator, one Clausman. After Clausman's conviction he and petitioner were simultaneously arraigned for judgment. The sentencing judge reviewed the records of both men and stated that he considered both of them "as standing in the same and identical shoes before the court with respect to these matters," and entered identical sentences accordingly, In re Antazo, 3 Cal. 3d 100, 106, 473 P.2d 999, 1001, 89 Cal. Rptr. 253, 257 (1970). Clausman, who was not an indigent, paid the fine portion of his sentence and was released immediately.
3. The court did not indicate what standard of indigency was used in the instant case. For discussion of current approaches to determining indigency for the purposes of criminal procedure, see Note, Discriminations Against the Poor and the Fourteenth Amendment, 81 Harv. L. Rev. 435, 443 (1967).
4. Petitioner's total imprisonment did not exceed the maximum authorized by statute for the substantive offense to which he had pleaded guilty. The maximum prison sentence provided under Cal. Penal Code § 448(a) (West 1970), is twenty years.
5. Cal. Penal Code § 1205 (West 1970), provides for default imprisonment for failure to pay a penal fine. Cal. Penal Code § 13521 (West 1970), authorizes the penalty assessment. The question whether defendant could be imprisoned for failure to pay his section 13521 penalty assessment was not reached by the court because of its disposition of the equal protection issue.
6. Respondents contended that habeas corpus could not be granted because petitioner did not take a timely appeal from the judgment. The court, however, said that the requirement that a petitioner exhaust his appellate or other remedies before applying for habeas corpus is a discretionary policy which may be waived under special circumstances. The special circumstances found in the instant case were the fact that petitioner presented a constitutional question of "great magnitude." 3 Cal. 3d at 107, 473 P.2d at 1002-03, 89 Cal. Rptr. at 258-59.
7. The court also noted that it saw no significant difference in the fact that petitioner's fine and penalty assessment had been imposed as a condition of probation in the court's probation order rather than in a judgment of conviction after denial of probation. In the court's opinion the same constitutional principles would govern in both situations. 3 Cal. 3d at 116, 473 P.2d at 1009, 89 Cal. Rptr. at 265.
him was not necessary to promote the state interests claimed and constituted an invidious discrimination, on the basis of wealth, in violation of the equal protection clause of the fourteenth amendment.\textsuperscript{7} \textit{In re Antazo}, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).

The practice of imprisoning a convicted defendant for nonpayment of a fine is as old as the common law itself.\textsuperscript{8} In the United States it is authorized in all states and by federal statute.\textsuperscript{9} The traditional argument advanced in justification of the practice is that it is a coercive device employed to obtain payment of the fine, and not a substitute form of punishment for the offense.\textsuperscript{10}

Some jurisdictions have attempted to mitigate the impact of the practice upon those who are unable to pay by providing for early release upon a showing of indigency,\textsuperscript{11} and several permit deferred or installment payment of the fine.\textsuperscript{12} A few states place statutory limitations upon the permissible term for default imprisonment.\textsuperscript{13} In those states which have no such limitations, however, courts have generally taken the position that alternative fine or imprisonment sentences are permissible because they are within the wide scope of discretionary powers granted to the sentencing judge.\textsuperscript{14}

\begin{itemize}
  \item \textsuperscript{7} U.S. CONST. amend. XIV, \S 1.
  \item \textsuperscript{9} The federal statute is 18 U.S.C. \S 3565 (1964). The state statutes are cited and annotated in the Appendix to Williams \textit{v}. Illinois, 399 U.S. 235, 246–59 (1970).
\end{itemize}
The development of an equal protection basis for attacking default imprisonment began with *Griffin v. Illinois*,¹⁶ in which the Supreme Court employed the equal protection clause of the fourteenth amendment in a significant effort to ameliorate economic discrimination against indigents who are thrust into the maelstrom of the criminal justice system. In *Griffin*, where petitioners had not been able to appeal their conviction because they were too poor to buy a stenographic transcript of their trial, it was held that if a transcript was necessary in order to obtain adequate appellate review, then equal protection required that indigent defendants be provided with such a transcript at state expense.¹⁶ In reaching this conclusion, the Court used a two-step reasoning process. First, it stated that a law which is nondiscriminatory on its face may be grossly discriminatory in its operation, and that such a discriminatory result, even if unintended, could be challenged on equal protection grounds.¹⁷ Finding such a discriminatory result on the facts before it, the Court reasoned that since a defendant’s ability to pay the costs of appeal bore no rational relationship to the question of his guilt or innocence, discrimination on account of poverty in criminal trials was fully as invidious as discrimination according to race, creed or color, and was thus violative of equal protection.¹⁸

Since the focus in *Griffin* was limited to the period during which guilt or innocence is determined, i.e., the trial and appeal, there was judicial uncertainty whether the equal protection rationale advanced therein was applicable to sentencing proceedings. A few courts held that it did apply,¹⁹

¹⁶ People ex rel. Crockett v. Redman, 41 Misc. 2d 962, 246 N.Y.S.2d 861 (Sup. Ct. 1964) ; Foertsch v. Jameson, 48 S.D. 328, 204 N.W. 175 (1925). See also Hill v. Wampler, 298 U.S. 460 (1936) and *Ex parte* Jackson, 96 U.S. 727 (1877), in which the Supreme Court tacitly approved of the practice, although the issue of its application to indigents was not raised.


¹⁸ Id. at 19-20.

¹⁹ 351 U.S. at 19. *Griffin* was decided on due process as well as equal protection grounds; however, since *Antazo* was decided only on the basis of equal protection, this Note will concentrate primarily on equal protection. For a discussion of the interplay of the two concepts in recent cases, see Note, *Developments in the Law — Equal Protection*, 82 Harv. L. Rev. 1655, 1777-90 (1969).
but some of these holdings dealt only with the per diem rates at which fines were to be discharged during imprisonment.\textsuperscript{20} Other courts rejected the contention that the \textit{Griffin} rationale applied in any way to the question of default imprisonment of indigents.\textsuperscript{21}

This uncertainty was resolved by the Supreme Court in \textit{Williams v. Illinois}.\textsuperscript{22} There, appellant was convicted of petty theft and received the maximum sentence provided by law — one year's imprisonment and a $500 fine. Since he could not pay the fine due to his indigency, he was to remain in prison and "work off" the monetary obligation at the rate of five dollars per day in addition to his one-year sentence. The Court, placing great emphasis upon \textit{Griffin}, held that an indigent offender could not be imprisoned for nonpayment of a fine or court costs for a period in excess of the maximum term authorized as punishment for the substantive offense.\textsuperscript{23} Chief Justice Burger, delivering the opinion of the Court, reasoned that once the state had by statute defined the "outer limits of incarceration necessary to satisfy its penological interests and policies,"\textsuperscript{24} thereafter to subject a certain class of convicted defendants to an additional term solely because of their indigency was to create a discrimination based on ability to pay which violated equal protection. Since the state's avowed purpose in confining an indigent beyond the statutory maximum was to compel payment through the "working out" of the fine, said the Court, the state interest in compelling payment would be equally well served by providing alternative means of satisfying the fines which would not involve additional imprisonment.\textsuperscript{25}

\textsuperscript{20} Many default imprisonment statutes provide a daily rate for discharge of the fine. These rates vary between $1 and $10 per day, and are commonly in the $2 to $5 range. \textit{See} Appendix to \textit{Williams v. Illinois}, 399 U.S. 235 at 245-59 (1970). In \textit{Strattman v. Stoldt}, 20 Ohio St. 2d 95, 253 N.E.2d 749 (1969), \textit{noted} in 31 Ohio St. L.J. 342 (1970), the court held that a per diem rate of $3 was so low that it violated equal protection.

In today's society, no one, in good conscience, can contend that a nine-dollar fine for crashing a stop sign is deserving of 3 days in jail if one is unable to pay. The effect of [the default imprisonment statute setting a $3 per diem rate], when applied to the indigent, denies him equal protection and punishes him much more severely merely because he is unable to pay. \textit{Id.} at 101-02, 253 N.E.2d at 753. \textit{See also} People v. Collins, 47 Misc. 2d 210, 212, 261 N.Y.S.2d 970, 973 (1965) (dictum).

\textsuperscript{21} \textit{See}, e.g., United States \textit{ex rel. Privitera v. Kross}, 239 F. Supp. 118 (S.D. N.Y.), \textit{aff'd}, 345 F.2d 533 (2d Cir.), \textit{cert. denied}, 382 U.S. 911 (1965), the court said that:

\[ \text{[t]hose decisions making review of criminal convictions available to the indigent have not yet been construed to compel government, State or Federal, to eradicate from the administration of criminal justice every disadvantage caused by indigence.} \]


\textsuperscript{22} 399 U.S. 235 (1970).

\textsuperscript{23} 399 U.S. at 241.

\textsuperscript{24} \textit{Id.} at 241-42. In this case, as in \textit{Griffin}, the Court found a law nondiscriminatory on its face but "grossly discriminatory" in its operation, since the choice of paying a fine or serving an extended prison term was in fact an illusory choice for a person without funds, and the result of the statute was thus to make imprisonment beyond the statutory maximum applicable only to indigents. \textit{Id.} at 242. \textit{See also} note 17 and accompanying text \textit{supra}.

\textsuperscript{25} The Court also made it clear that in the event such alternatives were rejected by any defendant, rich or poor, imprisonment for willful refusal to pay the fine would
Although *Williams* established that equal protection applies to the sentencing stage of the criminal process, the Court carefully limited its holding and discussion to the "maximum-plus" situation. It emphasized that its decision did not deal with the "familiar pattern of $30 or 30 days," nor did it curtail judicial discretion within the statutory maximum to impose differing sentences for similar offenses. Thus, it was made apparent that *Williams* would not necessarily control the question whether default imprisonment of indigents for periods less than the statutory maximum may violate equal protection, and it was to this question that the *Antazo* court addressed itself.

Since the Supreme Court did not expressly indicate the equal protection test which it employed in reaching its decision in *Williams*, the California court was initially confronted with the task of setting forth the equal protection test which it felt was applicable to the situation. At the outset the court rejected what it characterized as the "traditional test" asserted by the State, which posits that where a state law results in a classification, such classification must merely bear some rational nexus to a legitimate state end. Rather, it was observed, the Supreme Court has tended to employ a two-level test in reviewing legislative classifications, generally applying the "traditional test" only in areas such as economic regulation where judicial restraint is considered essential. A stricter test, the court felt, has been applied in cases involving "suspect classifications" or touching upon "fundamental interests," and in such cases the Supreme Court has subjected the classification to strict scrutiny, shifting the burden to the state to establish not only that it has a compelling interest which justifies the law but also that the distinctions created by the law are necessary to further its purpose.

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be permissible as always. 399 U.S. at 242 n.19. For discussion of the various existing and proposed alternatives, see notes 71-76 and accompanying text *infra*.

26. 399 U.S. at 243. The "familiar pattern" is discussed at notes 66-68 and accompanying text *infra*.

27. In this regard the Court explained:

The mere fact that an indigent in a particular case may be imprisoned for a longer time than a non-indigent convicted of the same offense does not, of course, give rise to a violation of the Equal Protection Clause. Sentencing judges are vested with wide discretion in the exceedingly difficult task of determining the appropriate punishment in the countless variety of situations which appear. The Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences.

*Id.*

28. *See* notes 23 & 24 and accompanying text *supra*. However, it appears that in *Williams*, the Court applied a test very similar to that announced by the *Antazo* court. *See* note 32 and accompanying text *infra*.


31. The court noted at the outset, following *Griffin* and *Williams*, that a statute fair on its face may nevertheless result in an invidious discrimination violative of equal protection. 3 Cal. 3d at 111-12, 473 P.2d at 1006, 89 Cal. Rptr. at 260.

32. 3 Cal. 3d at 111, 473 P.2d at 1005, 89 Cal. Rptr. at 261.
Classifications based on race and lineage have traditionally been regarded as “suspect” by the courts, and have therefore been subject to active review under the equal protection clause.\textsuperscript{33} Interests which have been designated so fundamental as to deserve exacting judicial inquiry include rights in the area of criminal procedure\textsuperscript{34} and interests in voting,\textsuperscript{35} marriage and procreation,\textsuperscript{36} and to some extent, education.\textsuperscript{37} In recent years, classifications on the basis on wealth have also begun to receive strict scrutiny, but only, it appears, when they are associated with an invasion of some “fundamental interest.”\textsuperscript{38} The \textit{Antaslo} court perhaps over-simplified the rule, therefore, when it stated that a “suspect classification” or a “fundamental interest” would shift the burden of proof to the state. It has been suggested that a more accurate approach is to view the two factors as interrelated variables, and that courts will ordinarily look for a “suspect classification” and a “fundamental interest” unless the classification or the interest presents a sufficiently compelling case standing alone.\textsuperscript{39}


\textsuperscript{39} Note, Developments in the Law — Equal Protection, 82 Harv. L. Rev. 1065 (1969), summarizes the Court's approach as follows:

The interaction of these two factors can be visualized by imagining two gradients. Along the first . . . is a hierarchy of classifications, with those which are most invidious — suspect classifications based on traits such as race — at the top. Along the second, arranged in ascending order of importance, are interests such as employment, education, and voting. When the classification lies at the top of the first gradient, it will be subject to strict review even when the interest it affects ranks low on the second gradient — for example, denial of a driver's license on the basis of race. As the nature of the classification becomes less invidious . . . the measure will continue to elicit strict review only as it affects interests progressively more important. . . . Thus, restrained review might be applied when a state disqualifies indigents by requiring a fee from all persons desiring a driver's license or a university education, whereas strict review is applied when indigents are disqualified from voting through a fee imposed for the exercise of that right.

\textit{Id.} at 1120–21.

Critics of this approach contend that the Court may be resurrecting substantive due process when interests which are not expressly given protection in the Constitution, nor are so “implicit in the concept of ordered liberty,” Palko v. Connecticut, 302 U.S. 319 (1937), as to be protected under due process, are selected for special treatment under equal protection. \textit{See} 82 Harv. L. Rev. at 1131; Mr. Justice Harlan's concurrer opinion in \textit{Williams}, 399 U.S. at 259. To this type of criticism, the Court has replied:

[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.

The consequence of such an oversimplification is illustrated by the fact that having thus stated the rule in the disjunctive, the Antazo court concluded that strict scrutiny was justified because a classification based on wealth had been identified. Clearly, the judicial system cannot redress every inequality resulting from economic disparities, and it is erroneous and misleading to create the impression that this is the current direction of equal protection decisions. It is therefore submitted that instead of ending its threshold inquiry with the determination that a suspect classification was present, the court should have expressly pointed out that the classification in question affected an interest which has come to be regarded as fundamental — that is, the interest in criminal procedure protections as developed by Griffin and Williams — and that it was the conjunction of those two factors which imposed the “compelling interest” burden of proof upon the government.

The “compelling state interest” standard which appears to have evolved following Griffin involves the balancing approach rather than the traditional inquiry into the “rationality” of a state measure. Under the “compelling interest” standard a court will inquire whether the societal benefit claimed by the state far outweighs the detriment inflicted upon the individual. Only if the state can establish this degree of interest will the court proceed to inquire into the constitutionality of the means chosen to achieve the state’s purpose. Following Williams, the Antazo court assumed that the state’s interests in the collection of fines and in the rehabilitation and reformation of convicted offenders were “substantial and legitimate,” thus satisfying the “compelling state interest” aspect of the test. However, the means chosen by the state to effectuate these goals were found to be objectionable, since, in the court’s view, default imprisonment was not “necessary” to promote either state interest.

40. 3 Cal. 3d at 112, 473 P.2d at 1006, 89 Cal. Rptr. at 262.

41. Although Justice Harlan concurred in Williams because he thought the same result could be reached through the due process clause, he expressed his disapproval of using broad equal protection standards to correct economic inequalities affecting the criminal process. He said that if the equal protection implications of Williams were carried to their logical end, for example, the state would be forced to develop a system of individualized fines, “such that the total disutility of the entire fine, or the marginal utility of the last dollar taken, would be the same for all individuals.” He noted, however, that despite the possibility that the Court might carry its “rhetorical preoccupation with equalizing” to extremes, it had refrained from so doing because of obvious practical limitations. 399 U.S. at 261.


43. See text accompanying note 29 supra.

44. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969), where the Court held that while a state law which conditions welfare eligibility upon one year’s residency in the state may have the rational purpose of restricting the movement of indigents into the state, it serves no compelling state interest when balanced against the detriment incurred by the indigent when he effectively is forced to choose between receiving welfare and changing his state of residence. See also Hunter v. Erickson, 393 U.S. 385 (1969); Williams v. Rhoads, 393 U.S. 23 (1968).

45. 3 Cal. 3d at 112, 473 P.2d at 1006, 89 Cal. Rptr. at 262.
With respect to enforcing collection of the fine the court stated that it failed to see how either the threat or the actuality of imprisonment when applied to a man without funds could serve the state interest in collecting fines, since the use of imprisonment as a coercive device must necessarily presuppose a recalcitrant offender with the ability to pay.\textsuperscript{46} Although the logic of this position is difficult to circumvent, it has long been avoided by the courts,\textsuperscript{47} presumably because of their reluctance to abandon either default imprisonment itself or the traditional justification for the practice.\textsuperscript{48} Perhaps, then, the explanation for the \textit{Antazo} court's willingness to recognize this inconsistency is that, having determined that default imprisonment should no longer be imposed upon indigents, the court no longer felt impelled to pay homage to its rationale.

Having concluded that, even if imprisonment of indigents could arguably serve the state interest in collecting fines, such a method was not "constitutionally necessary" since there were equally effective alternative procedures available,\textsuperscript{49} the court examined the state's contention that imprisonment served the state interest in the rehabilitation and reformation of indigent offenders. Respondents argued that imprisonment for failure to pay a fine would impress upon an indigent offender his responsibility to society for his criminal behavior in the same manner and to the same degree that payment of the fine by a non-indigent would promote this goal. The court was unwilling to agree that the rehabilitative effect of imprisoning an indigent could be equated with that of fining other offenders, but concluded that even if there were such a correspondence, because the state could also promote this latter interest through alternative procedures the imposition of default imprisonment upon indigents was not "constitutionally permissible."\textsuperscript{50}

The court's analysis of the state interests in rehabilitation and reformation is strengthened by the fact that most commentators agree that imprisoning indigents for nonpayment of fines tends to frustrate rather than promote those interests.\textsuperscript{51} In addition, it has been pointed out by

\textsuperscript{46} 3 Cal. 3d at 114, 473 P.2d at 1007, 89 Cal. Rptr. at 263.


\textsuperscript{48} See note 10 and accompanying text supra.

\textsuperscript{49} 3 Cal. 3d at 114, 473 P.2d at 1008, 89 Cal. Rptr. at 264. See notes 71–76 and accompanying text infra for discussion of the alternative enforcement methods.

\textsuperscript{50} 3 Cal. 3d at 115, 473 P.2d at 1008, 89 Cal. Rptr. at 264.

Mr. Justice Harlan that when the state by statute permits a fine as an alternate it has, in effect, declared that it is indifferent to whether or not the offender is imprisoned, and that all of its penological interests can be satisfied by some punishment other than imprisonment. Having made this declaration, the state cannot then insist before a court that default imprisonment is necessary to serve its penological interests. 52

It is perhaps unfortunate that the Antazo court stated its test for the constitutionality of the means chosen to implement state policies in terms of necessity, 53 for although the Supreme Court has upon occasion used such language, 54 it gives rise to the criticism that the Court has, in effect, usurped the legislature’s legitimate authority to determine how state interests are to be effectuated. 55 Therefore, it is suggested that instead of requiring a standard of necessity, a more acceptable formulation of the test would be to inquire whether reasonable, less onerous alternatives are available which would adequately promote the compelling state interests at stake. 56 In making such an inquiry the court would balance the detriment to the individual caused by the state procedure under attack against the burden which the state would incur if it provided a less detrimental alternative; and, as in the “compelling interest” stage of the inquiry, the burden of proof would be on the state. This formulation more clearly preserves the legislative prerogative and recognizes that the courts’ proper role is that of setting forth a broad constitutional framework within which legislators must operate.


These criticisms center around the disutility of short-term imprisonment; namely, (1) it is not long enough for effective rehabilitative programs; (2) it exposes minor offenders to the influence of hardened criminals; (3) it severs any existing employment and the stigma of imprisonment reduces the chances for employment upon release; and (4) it deprives the family of whatever support the offender may have been able to provide.

In addition to these criticisms, the default imprisonment of indigents has been identified as one of the factors contributing to present racial tension. According to the Report of the National Advisory Commission on Civil Disorders (Bantam 1968):

The belief is pervasive among ghetto residents that lower courts . . . dispense "assembly line" justice, that from arrest to sentencing, the poor and uneducated are denied equal justice with the affluent, that procedures such as . . . fines have been perverted to perpetuate class inequities. . . . [T]he apparatus of justice in some areas has becomes [sic] a focus for distrust and hostility. Too often the courts have operated to aggravate rather than relieve the tensions that ignite and fume civil disorders.

Id. at 337.

53. See text accompanying note 32 supra.
55. See Note, supra note 3. See also Note, Rational Classification Problems in Financing State and Local Government, 76 Yale L.J. 1206 (1967).
56. For instances of the application of this test, see, e.g., Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) and Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951) (state regulation of interstate commerce); Schneider v. State, 308 U.S. 147, 162 (1939) (first amendment rights). See also Struve, The Least-Restrictive-Alternative Principle and Economic Due Process, 80 Harv. L. Rev. 1463 (1967).
It should be noted, however, that despite the Antazo court's careful scrutiny of default imprisonment as a means to achieve the asserted state interests, it does not appear that the strict test of necessity was actually followed. In both Antazo and Williams, it was the finding that less onerous alternatives were reasonably available which led the courts to conclude that such alternatives must be offered to indigent defendants.87

The practical implications of Antazo must be considered in light of what was already established by Williams. Applying the holding of Williams,88 it is possible to conclude, although the Court did not explicitly so indicate, that default imprisonment may not be imposed where the substantive offense is punishable only by fine because in such a situation the state has declared that "the outer [limit] of incarceration necessary to satisfy its penological interests"89 is no incarceration at all. However, Williams laid down no rule for application to the vast area between these two extremes, i.e., where the substantive offenses are still punishable by fine and/or imprisonment.90

Antazo advanced the proposition that in cases where the state authorizes alternative fine or imprisonment, once the court determines the amount of imprisonment which it considers an appropriate punishment it may not permit additional imprisonment to be imposed simply because a defendant is indigent.91 The relevant inquiry, therefore, is whether the defendant is being imprisoned as punishment for his substantive offense, or whether his imprisonment is due solely to his indigency.

The problem of proof under such a test may pose some practical obstacles. This was not, of course, true in Antazo, where for the same offense and under the same sentence an affluent offender paid his fine and was released while the indigent began to serve a jail sentence of nearly a year.92 However, in most cases the discrimination may not be so apparent, for the sentencing judge still retains discretion to impose differing types of sentences for similar offenses93 and, as at least one court has pointed

87. See notes 25, 49 & 50 and accompanying text supra for this aspect of the courts' reasoning in Williams and Antazo.
88. See note 23 and accompanying text supra.
89. 399 U.S. at 242.
90. The Court confirmed this observation by its holding in Short v. Tate, 39 U.S.L.W. 4301 (U.S., Mar. 2, 1971), where, relying on Williams, it reversed a denial of habeas corpus where an indigent petitioner was imprisoned for nonpayment of $425 in accumulated traffic fines. All of the offenses involved were punishable only by fines.
91. See notes 26 & 27 and accompanying text supra.
92. The court stated that:
[Al]though the [sentencing] court had apparently determined that a proper punishment for his [petitioner's] offense did not require incarceration, he was unable to obtain his freedom only because he was poor.
—and it explained that its holding required:
[Si]mply that an indigent who would pay his fine if he could, must be given an option comparable to an offender who is not indigent.
3 Cal. 3d at 115-16, 473 P.2d at 1009, 89 Cal. Rptr. at 265.
93. As in Williams, see note 27 and accompanying text supra, the Antazo court affirmed that "nothing in today's opinion diminishes the wide scope of authority vested
out, it would not be difficult for judges to seek to avoid the issue simply by not imposing sentences in terms of alternative fine or imprisonment.\textsuperscript{65} In such cases, the petitioner will have the burden of proving that his imprisonment is due to his indigence and is not imposed because of a judicial determination that imprisonment is the appropriate punishment. This may be difficult to prove unless it can be shown that the court has established a pattern of fining the affluent and imprisoning the indigent.

Although \textit{Williams} expressly reserved judgment on the viability of the familiar sentencing pattern of thirty dollars or thirty days,\textsuperscript{66} the \textit{Antazo} court took no position on this practice. \textit{Antazo}'s rationale, however, is clearly applicable to prevent its use where the offender is indigent and would otherwise be willing to pay. In the first place, it has been forcefully argued that imprisonment for such a short duration could not possibly serve the state interests in reformation and rehabilitation of the offender.\textsuperscript{67} Assuming that it could, however, a showing that there are adequate and less discriminatory alternatives to imprisonment would justify the conclusion that the thirty dollar or thirty day type of sentence fails to meet the \textit{Antazo} test, since it has the effect of imprisoning indigents because of their poverty.\textsuperscript{68}

It might be noted that in both \textit{Williams} and \textit{Antazo} the equal protection clause was applied to “the state” without differentiating the functions which the legislature and the courts perform in the sentencing process. Traditionally, however, courts have exercised a separate power

\begin{itemize}
  \item \textsuperscript{64} United States \textit{ex rel.} Privitera v. Kross, 239 F. Supp. 118, 119 (S.D.N.Y.), aff'd, 345 F.2d 533 (2d Cir.), cert. denied, 382 U.S. 911 (1965).
  \item \textsuperscript{65} Instead, estimating the financial condition of the defendants before them, judges could fine wealthy offenders and imprison indigents, justifying their decisions with the argument that a fine cannot effectively punish a man who knows he is unable to pay. Such a result is clearly inconsistent with the spirit of \textit{Antazo}, which requires that unless the judge determines that imprisonment is indicated because of the nature of the substantive offense and the past criminal record of the offender, it should not be inflicted on any offender, rich or poor, unless he contumaciously refuses to pay his fine. 3 Cal. 3d at 115, 473 P.2d at 1009, 89 Cal. Rptr. at 265.
  \item \textsuperscript{66} See note 26 \textit{supra} and accompanying text.
  \item \textsuperscript{67} See authorities cited \textit{supra} note 51.
  \item \textsuperscript{68} It could be argued, however, that since the rule which the court employed in the instant case indicates a balancing approach, the state may be able to meet its heavy burden of proof by establishing that where the offense is of such a minor nature that the volume of such sentences is overwhelming, administrative difficulties would make it impossible to provide less onerous alternatives to imprisonment, see notes 73-75 \textit{infra}, and that imprisonment is therefore necessary if the state interests in punishment and deterrence are not to be seriously undermined. It must be recognized, however, that courts have generally looked critically upon the state's asserted interest in avoiding administrative burdens when such an interest was balanced against important individual rights, see, e.g., Goldberg v. Kelly, 397 U.S. 254, 266 (1970). Moreover, an anomalous result would obtain if an indigent could be subjected to the evils of default imprisonment for committing a minor offense, but not for perpetrating a slightly more serious one. Apart from these objections, if the thirty dollar or thirty day sentence should be upheld as applied to indigents, the per diem rate would then be subject to attack for being so low as to constitute a violation of equal protection. See note 20 \textit{supra}.
\end{itemize}
to impose sanctions for contempt of their orders; 69 thus, arguably an offender who failed to pay his fine could still be sentenced to imprisonment for contempt notwithstanding Antazo. However, since the gravamen of contempt is willful, contumacious refusal to comply with the court's order, 70 it is submitted that an indigent would have a valid defense in that his lack of funds vitiated any choice whether or not to obey.

A final question concerns whether the alternative enforcement measures which are available 71 or which could be devised are in fact reasonable and adequate. The courts in both Williams and Antazo assumed that they were. 72 However, it is possible that such methods may prove to be unreasonably burdensome for the sentencing courts to administer for all indigent offenders, 73 or that they will not be able to be enforced effectively 74 and that better alternatives cannot be devised. Some might argue that a rule of such far-reaching impact should not have been imposed when there appears to be a significant lack of empirical data on its feasibility. 75 However, in view of the magnitude and severity of the discrimination resulting


70. Application of McCausland, 130 Cal. App. 2d 708, 279 P.2d 820 (1955). See also Goldfarb, supra note 69, at 2, where it is stated, "The sanction is aimed at a resisting will."

71. The alternatives which have been suggested to date include deferred and installment payments, see note 12 and accompanying text supra; a parole requirement that the offender do specified work during the day, Comment, Equal Protection and the Use of Fines as Penalties for Criminal Offenses, 1966 U. Ill. L.F. 460, 465; rehabilitative treatment or supervision by court or social agencies of those unable to satisfy the fine, or remission of the fine altogether in proper cases, id. at 466; or the less effective levy on the offender's property, Rinaldi v. Yeager, 384 U.S. 305, 310 (1966); S. Rubin, The Law of Criminal Correction 483-86 (1963).

72. See 399 U.S. at 244-45 n.21 and accompanying text; 3 Cal. 3d at 114 n.13, 475 P.2d at 1008 n.13, 89 Cal. Rptr. at 264 n.13 and accompanying text.

73. See Herlihy, Sentencing the Misdemeanant, 2 Nat'l Probation & Parole Ass'n J. 360 (1956):

The plan of installment fines is workable only if the court has adequate personnel for bookkeeping and a sufficient number of probation workers trained in social casework and skilled in helping offenders who lack the ability to cope with their economic responsibilities.

Id. at 368. Offsetting the costs of such services, however, would be the increased collection of revenues from fines and the reduction in state expenditures for imprisonment.

74. Judge Herlihy, a municipal court judge in Delaware, found that permitting installment payments resulted in a high rate of recidivism ("we were encouraging irresponsibility by making it easier to pay"), so his court discontinued installment payments although it continued to permit deferred payment in some cases. Id. at 367-68. More successful experience with installment payments was reported by Judge Binford, a West Virginia municipal court judge, who found that even during Depression years and with inadequate probation services only five percent of those allowed to pay by installment had to be committed. Binford, Installment Collection of Fines, Proc. Cong. Amer. Pen. Ass'n 361 (1937).

75. The fact that installment payments are already in use in several jurisdictions does not indicate their effectiveness, because they are discretionary rather than mandatory. Williams and Antazo did not cite any studies of the results of using the alternative methods, see note 72 supra, and in addition to the sources cited supra notes 73 & 74, the only such studies which have appeared deal with results in Great Britain and Sweden before 1947. See Note, supra note 47. Although these reports were favorable, they are not necessarily conclusive of what result may be expected in the American penal system.
from default imprisonment of indigents,\textsuperscript{76} it is submitted that the court acted properly in requiring that alternative sentencing methods be attempted.

Thus, in the instant case the California court concluded that the reasoning of \textit{Williams} should be extended to sentences which result in imprisonment of indigents for periods less than the statutory maximum provided for the substantive offense. The equal protection basis of \textit{Williams} provided ample authority for this extension. The court in \textit{Antazo}, however, properly decided to delineate more clearly the applicable equal protection test, in order to provide guidance in subsequent decisions which will apply the \textit{Antazo} rationale. Although the instant decision will involve significantly greater administrative burdens than those imposed by \textit{Williams}, such burdens should nevertheless prove to be slight in comparison with the resulting reduction in the discrimination involving critical personal interests which is attendant to the condition of poverty.

\textit{Mary Bowen Little}

\textbf{ENVIRONMENTAL LAW — CONGRESS HAS AUTHORITY UNDER THE COMMERCE CLAUSE TO PROTECT MARINE ECOLOGY IN INTRASTATE WATERS — CORPS OF ENGINEERS TO TAKE ENVIRONMENTAL CONSIDERATIONS INTO ACCOUNT IN THE MANAGEMENT OF NAVIGABLE WATERS.}

\textit{Zabel v. Tabb} (5th Cir. 1970)

Respondents, Zabel and Russell, land developers, had applied to the Pinellas County Water and Navigation Control Authority for a permit to dredge and fill 11.5 acres of Boca Ciega Bay, near St. Petersburg, Florida, for the purpose of constructing a mobile trailer park, but the permit was refused. The District Court of Appeals of Florida upheld the Authority's decision\textsuperscript{1} and respondents appealed to the Supreme Court of Florida, which reversed the lower court's holding and remanded for cause.\textsuperscript{2}

\begin{footnotesize}
\begin{enumerate}
\item In \textit{Williams} it was noted that the greatly increased use of fines as a criminal sanction has made nonpayment a major cause of imprisonment in this country. 399 U.S. at 240.
\item Zabel v. Pinellas County Water & Navigation Control Authority, 154 So. 2d 181 (Dist. Ct. App. Fla. 1963). The district court held that the evidence warranted the rejection of the application on the ground that the proposed fill would produce materially adverse effects, that the doctrine of election of remedies and estoppel did not bar the owners from asserting the unconstitutionality of the statutes' imposing limitations on the filling and developing of bottom land in the Bay, and that the statutes were constitutional as applied in the instant case.
\item Zabel v. Pinellas County Water & Navigation Control Authority, 171 So. 2d 376 (Fla. 1965). The Florida Supreme Court held, \textit{inter alia}, that the denial of the permission to fill amounted to a taking of property without just compensation where it was not established that the granting of the permit would materially and adversely affect the public interest. On remand, the district court vacated its prior judgment and withdrew its mandate, issuing a new mandate on the judgment of the supreme court.
\end{enumerate}
\end{footnotesize}
Having obtained a permit from the county authorities, respondents next had to obtain a similar permit from the Army Corps of Engineers, as provided by the Rivers and Harbors Act of 1899. The Corps refused to issue the permit on the grounds that the fill would have an adverse effect on the marine life of the area and thus disturb the delicate ecological balance. Respondents challenged the Corps' decision in the United States District Court for the Middle District of Florida, which reversed the Corps' decision, stating that the Corps could consider only the effect that the fill would have on navigation. On appeal, the Court of Appeals for the Fifth Circuit reversed, holding that the Secretary of the Army was entitled to consider ecological factors in refusing to issue a permit to build in navigable waters. Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), cert. denied, 39 U.S.L.W. 3356 (U.S., Feb. 23, 1971) (No. 955).

court. At the direction of the district court, the Circuit Court of Pinellas County ordered the authority to issue a dredge and fill permit. From this order the authority appealed. On appeal the district court held that the order of the circuit court complied with the judgment of the supreme court and the district court's mandate thereon. Pinellas County Water & Navigation Control Authority v. Zabel, 179 So. 2d 371 (Dist. Ct. App. Fla. 1965).

3. 33 U.S.C. § 403 (1964), provides in pertinent part:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; it shall not be lawful to excavate or fill, or in any manner to alter . . . unless the work has been recommended by the Chief of Engineers. . . .

4. A public hearing was held in St. Petersburg in November 1966, at which time evidence was presented in support of both positions that the fill would and would not pollute the water. On December 30, 1966, the District Engineer, Colonel Tabb, recommended to his superiors that the application be denied.

Ecology is the science of the relationships between living organisms and their living and nonliving surroundings. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: THE FIRST ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 6 (1970). The term "ecological balance" serves to represent that these organisms live in a necessary balance with each other.

5. Zabel v. Tabb, 296 F. Supp. 764, 767 (M.D. Fla. 1969). The court took note of the rule established in General Motors Corp. v. United States, 324 F.2d 604 (6th Cir. 1963), which states that a court may not overrule an administrative agency upon a question committed to agency discretion unless the agency's "findings were contrary to law, were arbitrary or capricious, or were unsupported by substantial evidence. . . ." See also Citizens Comm. for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970).

The district court decided to review this case despite the fact that in 1968 the Corps amended its regulations to read in relevant part:

The decision as to whether a permit will be issued must rest on an evaluation of all relevant factors, including the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest. . . .

33 C.F.R. § 209.120(d)(1) (Supp. 1970). Therefore, it is possible to infer that the district court considered the Corps' action in amending its regulations to be an abuse of discretion.


7. Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970). Specifically, the court stated that: "Nothing in the statutory structure compels the Secretary to close his eyes to all that others see or think they see. The establishment was entitled, if not required, to consider ecological factors and, being persuaded by them, to deny that which might have been granted routinely five, ten, or fifteen years ago before man's explosive increase made all, including Congress, aware of civilization's potential destruction from breathing its own polluted air and drinking its own infected water and the immeasurable loss from a silent-spring-like disturbance of nature's economy."

Id. at 201.
Our federal form of government necessitates federal control over navigable waters. This has traditionally been the case, for when the powers of external sovereignty passed from Great Britain, they passed to the colonies in their corporate capacity as the United States of America and not to the individual colonies.\(^8\) One point of confusion which developed concerned jurisdiction over the metamorphic land between high and low tides. The Supreme Court, in 1842, adopted the high tide rule\(^9\) which appeared to establish state sovereignty\(^10\) over tidelands, and ostensibly the marginal sea.\(^11\) In 1947, however, state jurisdiction over the marginal sea was seriously questioned in *United States v. California*.\(^12\) The doubts raised by this case were partially allayed the following year when the Supreme Court recognized the states' authority over the marginal sea within their boundaries.\(^13\)

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10. It should be noted that although the states have title to the land above the "line of ordinary low water," *United States v. California*, 381 U.S. 139, 176 (1965), and are able, under individual state statutes, to convey the land, they cannot convey a fee simple title to lands beneath navigable waters, because the federal government has an overriding interest in these lands. Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 435, 452 (1892).

11. The marginal or territorial sea is the water that touches upon the coast of a nation and forms the seaward boundary of a nation. In this area the nation exercises exclusive jurisdiction except for the right of passage given to foreign vessels. For a detailed study of what constitutes the marginal sea, see Gross, *The Maritime Boundaries of the States*, 64 Mich. L. REV. 639 (1966).

12. 332 U.S. 19, 32-35 (1947). The Court concluded that the marginal belt had been established as an incident of federal sovereignty over the seas surrounding our coast and that since this extension had occurred after the adoption of the Constitution by the several states, the original states could not have derived rights in these waters as an inherent attribute of their sovereignty.

13. In *Toomer v. Wittell*, 334 U.S. 385 (1948), the Court recognized the states' authority over marginal sea areas within their boundaries and that the *California* holding was limited to instances where federal authority was in conflict with an exercise of state jurisdiction. See Gross, *supra* note 11, at 641.
In an attempt to finally resolve all controversy as to the ownership of the tidelands and the marginal sea, Congress passed the Submerged Lands Act of 1953,14 abrogating authority over lands underlying the marginal sea.15 This Act, while vesting title to these lands in the states, specifically provided that the federal government retained control over these lands for the purposes of (1) navigation, (2) flood control, and (3) hydroelectric power production,16 leaving questions of further federal control for future clarification.17

Prior to the Submerged Lands Act, the Rivers and Harbors Act of 189918 had vested partial control over navigable waters in the Army Corps of Engineers. This delegation authorized the Corps to regulate all construction19 in navigable waters of the United States as it related to navigational use. While it has been posited that the Corps is limited to navigational considerations in administering the Act,20 there have been


15. 43 U.S.C. § 1311(a)(1) (1964). According to this Act, lands underlying the marginal sea are limited to lands underlying navigable waters within the states' boundaries. 43 U.S.C. § 1301(b), illustrates the extent of these boundaries. For the Supreme Court's determination of state marginal sea boundaries, see United States v. California, 381 U.S. 139 (1965); United States v. Louisiana, 363 U.S. 1 (1960).

16. 43 U.S.C. § 1311(d) (1964). Certain general powers were also retained under the Act. These powers are outlined in 43 U.S.C. § 1314(a) (1964), which states in relevant part:

The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs. . . .

17. See United States v. Rands, 389 U.S. 121, 127 (1967). The Court concluded that, even after the passage of the Submerged Lands Act, the federal government retained all of its navigational servitude and powers to regulate affected lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, and that nothing in the Act was to be construed as a release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power. In short, Congress did not abrogate any of its control over commerce or navigation. For the extent of the control over commerce, see United States v. Appalachian Elec. Power Co., 311 U.S. 377, 426 (1940), where the Court stated that federal jurisdiction over navigable waters is not limited to control for purposes of navigation only, but rather federal authority "is as broad as the needs of commerce." For a definitive statement of Congress' power to control commerce, see United States v. Darby, 312 U.S. 100 (1941).


19. This includes the construction of "any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States . . .", or the excavation, filling, alteration or modification of "the course, location, condition, or capacity of, any port, roadstead. . . ." 33 U.S.C. § 403 (1964).

20. See Miami Beach Jockey Club, Inc. v. Dern, 86 F.2d 135, 136 (D.C. Cir. 1936); 34 Op. Att'y Gen. 410, at 412, 415, 416 (1935); and 27 Op. Att'y Gen. 285, 288 (1909). Originally the Supreme Court interpreted the government's control over navigable waters as limited to navigational purposes. See Weber v. Board of Harbor Comm'rs, 85 U.S. (18 Wall.) 57 (1873); United States v. River Rouge Improvement Co., 269 U.S. 411 (1926). However, this control was broadened by the precepts
indicators that the Corps is not so confined.21 The Fish and Wildlife Coordination Act,22 as amended in 1958, seemingly allowed the Corps to consider conservation factors in granting construction permits. The Corps adopted this interpretation in 1968 when it specifically stated that, in the future, ecological, environmental, and aesthetic considerations, as well as navigational considerations, would be taken into account before any construction permits were granted.23 Furthermore, the National Environmental Policy Act of 1969,24 which specifically provides that all federal agencies take ecological considerations into account when dealing with activities which may possibly have an adverse effect upon man's environment,25 seems to further support this position.

The instant case represents the first judicial examination of the propriety of the Army Corps of Engineers' use of ecological factors as a determinant in granting construction permits. To deal with this question the Zabel court had to decide whether: (1) Congress had the power to prohibit a project on private riparian submerged land in navigable waters, for ecological reasons; (2) if Congress did have this power, had it relinquished it to the states; or (3) had it delegated this power to the Secretary of the Army.

Congress has the power to regulate commerce in navigable waters of the United States26 when the activity to be controlled has a substantial

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26. See note 20 supra.
economic effect on interstate commerce.\textsuperscript{27} The power to so regulate commerce applies to private riparian submerged lands in navigable waters as well as navigable waters generally.\textsuperscript{28} In determining that respondents' dredging and filling operations would have a substantial economic effect on interstate commerce the court stated, "[t]hat this activity meets this test is hardly questioned."\textsuperscript{29} It concluded:

[T]he destruction of fish and wildlife in our estuarine waters does have a substantial, and in some areas a devastating, effect on interstate commerce.\textsuperscript{30}

Since the commerce clause has traditionally been employed as a catch-all for a myriad of problems which were not specifically provided for by other constitutional provisions,\textsuperscript{31} the maintenance of a delicate ecological balance would seem to be readily actionable under the commerce clause when the destruction of natural resources will have an actual effect upon the flow of commerce.\textsuperscript{32} Public opinion has made it clear that there is a growing national concern that something must be done to preserve the ecological balance.\textsuperscript{33} The \emph{Zabel} decision may be construed as a constructive step in ecological preservation, for it provides a rationale upon which future judicial action may be predicated.\textsuperscript{34}

Federal power to regulate the filling of the Bay having been established, it was next necessary for the court to determine if Congress surrendered this responsibility to the states under the Submerged Lands Act of 1953.\textsuperscript{35} For the purposes of this case, however, the examination

\textsuperscript{27} Wickard v. Filburn, 317 U.S. 111 (1942). The Court stated:

[If appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

\textit{Id.} at 125.


\textsuperscript{29} Zabel v. Tabb, 430 F.2d 199, 203 (5th Cir. 1970).

\textsuperscript{30} Id. at 204.

\textsuperscript{31} For a recent example of how relatively insignificant the nexus has to be between the activity sought to be regulated and interstate commerce, thus providing a basis for the invocation of commerce clause power, see Daniel v. Paul, 395 U.S. 298 (1969), noted in 15 \textit{VILL. L. REV.} 466 (1970).

\textsuperscript{32} Studies conducted by the Bureau of Commercial Fisheries show that in Florida there is a resource loss of \$600 per year for each acre of disturbed (dredged) submerged land. \textit{ENVIR. REP.} - \textit{FED. LAWS} 51:4201 (1970). This affects interstate commerce in that fewer seafoods are available for sale out of state.


was limited to the possible surrender of authority over the tidelands. Respondents argued that under the Act, Congress retained only the power to regulate for purposes of (1) navigation, (2) flood control, and (3) hydroelectric power.\textsuperscript{36} The court rejected this contention, noting that it totally ignored the legislative history of the Act\textsuperscript{37} as well as specific language to the contrary found within the Act itself. Section 1314(a) of the Act provides, in pertinent part:

The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, . . . \textsuperscript{38}

The court concluded that this language, coupled with prior judicial interpretation of the Act,\textsuperscript{39} firmly established that Congress retained control of navigable waters, including those waters to which the states have title, whenever the activity related thereto creates any colorable effect upon commerce.

Having established that Congress had the power to regulate commerce for environmental reasons and that it had not abrogated this power, the Zabel court next determined how Congress had effectuated the exercise of this power. The court reasoned that in the instant case the instrument of congressional regulation was the Rivers and Harbors Act of 1899.\textsuperscript{40} As previously noted,\textsuperscript{41} this Act is administered by the Army Corps of Engineers and thus, casts the Corps in a role analogous to an administrative agency acting within the parameters of a delegation of authority. In seeking to define the scope of this delegation, the court concentrated its examination on prior case law with a focus toward determining whether the Corps had authority to refuse to issue construction permits upon ecological considerations. In arriving at the conclusion that the Corps did have such authority, the court reasoned that although the Corps' considerations had previously been confined to the effect of the

\textsuperscript{36} 43 U.S.C. § 1311(d) (1964).
\textsuperscript{37} The controversy which culminated in the Submerged Lands Act and the Outer Continental Shelf Act, 43 U.S.C. § 1331 (1964), was primarily concerned with who would receive the royalties from the development of oil and gas resources. The states feared the federal government would claim control as an adjunct to the newly declared "paramount rights" doctrine. United States v. California, 332 U.S. 804, 805 (1947). The new legislation was meant to allay these fears, for in effect it divided the "ownership" of the resources between the state and federal governments. The states became the "owners" of the resources of the tidelands and were to receive the benefits from them. The federal government, however, was given exclusive ownership vis-à-vis the states to the outer continental shelf. See Note, The Seaward Extension Of States: A Boundary For New Jersey Under The Submerged Lands Act, 40 Temp. L.Q. 66 (1966).
\textsuperscript{38} 43 U.S.C. § 1314(a) (1964).
\textsuperscript{39} United States v. Rand, 389 U.S. 121, 127 (1967). The Court essentially held that the United States retained all of its navigational servitude and powers to regulate commerce in the lands within the states' borders and navigable waters and that nothing in the Act was to be construed as a relinquishment of Congress' control over commerce.
\textsuperscript{40} Zabel v. Tabb, 430 F.2d 199, 207 (5th Cir. 1970).
\textsuperscript{41} See p. 769 supra.
construction upon navigation, the Rivers and Harbors Act did not preclude the Corps from using other determinative criteria. This permissive interpretation of the Act is not without precedent. Although most cases under the Act had been limited to navigational problems, a possible exception is found in United States ex rel. Greathouse v. Dern, where the Supreme Court held that the Secretary of the Army had authority to deny a permit for the construction of a wharf even though it would not interfere with navigation. The significance of the Greathouse decision lies in the Court's recognition that the Corps did not have to wear "navigational blinders" when it considered a permit request. In 1960, the Supreme Court further expanded the scope of the Rivers and Harbors Act in United States v. Republic Steel Corp., where it ruled that the Act provided the proper vehicle for controlling discharge of industrial waste into navigable streams. To reach this conclusion the Court reasoned that the Act should be read "charitably" in light of the necessity to preserve the beauty and use of our national waterways. Similarly, the

42. See, e.g., cases cited in note 20 supra.
43. An equally plausible interpretation of the statute was presented by the district court. That court gave the Act a literal interpretation, viewing it as vesting discretionary authority in the Corps solely in regard to the navigable capacity of the water. Zabel v. Tabb, 296 F. Supp. 764, 767 (M.D. Fla. 1969).
45. 289 U.S. 352 (1933).
46. The reason for the denial was that the United States had plans to condemn petitioner's land for use as a means of access to a proposed parkway. Allowing a wharf to be built would increase the expense to the government since it would increase the market value of the land and would require the government to pay for tearing down the wharf as well. Zabel v. Tabb, 430 F.2d 199, 208 (5th Cir. 1970).
47. Zabel v. Tabb, 430 F.2d 199, 208 (5th Cir. 1970).
48. 362 U.S. 482 (1960). In Republic Steel, the United States sought an injunction against several companies to: (1) stop them from depositing industrial solids in a navigable river without first obtaining a permit from the Corps; and (2) compel the companies to restore the channel to its former depth. The Court held that industrial deposits placed in the river in question by the companies reduced the depth of the channel substantially and created an "obstruction" within the meaning of the Rivers and Harbors Act.
49. The language employed by the Court in Republic Steel was as follows:
We read the 1899 Act charitably in light of the purpose to be served. The philosophy of the statement of Mr. Justice Holmes in State of New Jersey v. State of New York . . . that "A river is more than an amenity, it is a treasure," forbids a narrow, cramped reading of either § 13 or of § 10.
50. 362 U.S. 482, 491 (1960). But Mr. Justice Harlan, joined by Justices Frankfurter, Whittaker and Stewart in dissent, stated:
However appealing the attempt to make this old piece of legislation fit modern conditions may be, such a course is not a permissible one for a court of law, whose function it is to take a statute as it finds it.
decision rendered by the United States District Court for the Southern District of New York in *Citizens Committee For the Hudson Valley v. Volpe*,\(^5\) which criticized the Corps for its failure to follow statutory procedure,\(^4\) went one step beyond the holdings of *Greathouse* and *Republic Steel*. Whereas the latter cases recognized that the Corps did not have to limit its considerations to the effect upon navigation, the *Volpe* court held that the Corps has a *duty* to weigh other than navigational factors.\(^2\)

In outlining the parameters of limitation upon the Corps' exercise of discretion in granting construction permits, it is submitted that the *Zabel* court's interpretation of the Rivers and Harbors Act in conjunction with the aforementioned cases should not be construed to mean more than a recognition that the Corps must be cognizant of problems which arise ancillary to its primary function — *i.e.*, the granting of construction permits on navigable waters. This position seems supported by the court's statement that the examination of these cases in order to verify the Corps' taking note of non-navigational considerations is somewhat circuitous in light of other federal legislation which clearly illustrates a congressional intent that environmental factors should be generally considered by all federal agencies.\(^3\)

Although the court believed that the case law interpreting the Corps' scope of authority under the Rivers and Harbors Act was sufficient to support its conclusion that the Corps was acting within its discretion in denying a construction permit for ecological reasons, its explication of the Fish and Wildlife Coordination Act\(^6\) and the National Environmental Policy Act\(^5\) seemed to require it to find that the Corps was *compelled* to evaluate non-navigational considerations in deciding upon a permit application. The court's interpretation that the Fish and Wildlife Coordination Act requires dredging and filling agencies, whether public or private, and the Corps of Engineers to consult with the Fish and Wildlife Service for the purpose of conserving wildlife resources\(^6\) seems totally consistent

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52. The *Zabel* court stated that what *Volpe* essentially held was that because the expressway project in question also required the approval of the Secretary of Transportation, who is statutorily required to consider conservation before granting a permit, *i.e.*, 49 U.S.C. § 1653(f) (Supp. V, 1970), environmental protection purposes could only have been served if the Corps had taken upon itself the consideration of the fill project in the context of the entire development of which it was a part, rather than having limited its consideration solely to the effect of the project on navigation. *Zabel v. Tabb*, 430 F.2d 199, 208 (5th Cir. 1970).
56. 16 U.S.C. § 662(a) (1964). The court stated that if there was any doubt that the statute directs the Corps to consult with the Fish and Wildlife Service it can be quickly dispelled, for it would be incongruous for Congress, in light of the fact...
with the provision of the Act referred to by the court, which states that whenever any body of water is to be controlled or modified for any purpose whatever by any federal agency or any public or private agency under federal permit, such agency is to consult with the Fish and Wildlife Service. While this interpretation of the Act is without precedent it does seem to follow when the provision is viewed out of context. However, when examined in conjunction with other provisions of the Act, it is misleading and makes the court’s interpretation seem somewhat strained. The procedures that the federal agencies are to follow apply to water-resource development projects, not private land development activities, and the cases that have ruled on the implementation of the Act’s procedure have seemingly been limited to such projects. Moreover, the Act does not provide that the agency involved should revoke a permit (or refuse to give one) or cease its own environmental damaging activities. It merely provides that the recommendations propounded by conservation agencies “should be adopted to obtain maximum overall project benefits” and that the project plans should be modified to conform to conservation needs to the extent that the burden does not outweigh, in the agency’s judgment, the benefit.

Perhaps the court’s interpretation of this Act is more clearly understood when it is considered in light of the more pervasive impetus toward a national environmental protection policy which the court found reflected in the National Environmental Policy Act — the Magna Charta of the environmental protection movement. This Act essentially states that every federal agency shall consider ecological factors when dealing with activities which may have an adverse impact on man’s environment. The breadth of its language seems to clearly bring the Corps within its scope. Section 4332 of the Act provides in pertinent part that:

that it intends conservation to be considered in private dredge and fill operations, not to direct the only federal agency concerned with licensing such projects both to consult and to take such factors into account. Zabel v. Tabb, 430 F.2d 199, 209 (5th Cir. 1970).

It should be noted, however, that the district court presented a strong argument in reversing the Corps’ refusal to grant appellees a permit based on the language employed in the 1958 Act, 16 U.S.C. §§ 662(a), (b), and (h) (1964), and the Senate Report accompanying it, S. Rep. No. 1981, 85th Cong., 2d Sess. (1958); 1958 U.S. Code Cong. & Admin. News 3451. Quoting from the report, the district court stated:

The legislation would be a permissive law so far as it concerns relationship between water project construction agencies and fish and wildlife conservation agencies. The latter would not be given any veto power over any part of the water resources development program.


60. 16 U.S.C. § 662(b) (1964).


The fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, . . .

It is submitted that this expression of congressional intent is broad enough to lend credence to the Zabel court's declaration that the action of the Corps in denying a permit was not only permissible, but actually required. Moreover, although the National Environmental Policy Act has been held not to be retroactive, there does not seem to be any logical reason why the Corps could not implement the policy considerations expressed by the Act in its adherence to existing statutory norms, i.e., the Fish and Wildlife Coordination Act.

Two additional contentions of the respondents were treated summarily by the court: (1) that the denial of a permit without a hearing before the Fish and Wildlife Service was a deprivation of property without due process of law; and (2) that their private submerged property was taken for public use without just compensation. In answer to the first contention the court held that respondents were not entitled to a hearing before the Fish and Wildlife Service because it was not the agency directly concerned with the determination of the permit request. The respondents' contention that the denial of the permit constituted an illegal "taking" without compensation was also rejected by the court. This decision was based on the principle that there was no taking because the waters and underlying lands are subject to the paramount navigational servitude in the federal government.

63. Id.

64. Pennsylvania Environmental Council v. Bartlett, 315 F. Supp. 238, 248 (M.D. Pa. 1970). In Bartlett, the court held that the National Environmental Policy Act of 1969 would not bar the Secretary of Transportation from granting federal funds for a state secondary road construction project that antedated and did not comply with the Act, since the Act is not retroactive. However, the Zabel court took a different view, stating:

Although this Congressional command was not in existence at the time the permit in question was denied, the correctness of that decision must be determined by the applicable standards of today.

Zabel v. Tabb, 430 F.2d 199, 213 (5th Cir. 1970).


66. It should be noted, however, that respondents were given a hearing before the Corps. Id. at 202. See Morgan v. United States, 298 U.S. 468, 481 (1935); see also 52 Harv. L. Rev. 509 (1939), for an explanation of the policies underlying administrative procedural decisions, specifically with reference to Morgan.

67. Basically, this doctrine provides that the federal government may exercise its powers to control that which affects navigation and need not compensate for private property interests which may be impaired by the government's actions. This has been an absolute doctrine whereby states or individuals, acting under state authority or acquiescence, are precluded from interfering with federal actions. See United States v. Bellingham Bay Boom Co., 176 U.S. 211 (1900); South Carolina v. Georgia, 93 U.S. 4 (1876). The rationale that allows governmental "taking" under this doctrine is that there is no damage within the meaning of the fifth amendment because the taking was merely the lawful exercise of a power to which the property had always been subject. United States v. Chicago, M., St. P. & P. R.R., 312 U.S. 592 (1941).

In the past this doctrine has been limited to federal taking for purposes beneficial to
While the Zabel court has expounded the scope of authority running to the Corps of Engineers to provide a legal basis for the consideration of ecological factors in its decision making, it is submitted that this decision should not be construed to be a judicial recognition that the Corps has plenary power to make discretionary determinations with regard to matters of conservation, but rather that the Corps’ primary role in the area of environmental protection is that of an active enforcement tool, weighing and deciding upon information supplied to it by other agencies. 68 The Corps does not as yet have the requisite expertise to evaluate the complex problems of conservation. 69 It is submitted, however, that the Corps is required to 70 and should investigate possible ecological harm, and, in

navigation even though such benefit is not the exclusive or even the major purpose of the project. See United States v. Grand River Dam Authority, 363 U.S. 229 (1960).

In the instant case, it has been seen that if there was a taking, it was not for the benefit of navigation. It is submitted that public interest in environmental preservation is sufficient to allow a valid extension of the navigational servitude doctrine to include a taking without compensation for its benefit. Such an extension is not completely without precedent. Several state courts have held that an exercise of the state navigation power may be accompanied by a prerogative of no compensation. See, e.g., Beidler v. Sanitary Dist., 211 Ill. 628, 71 N.E. 1118 (1904); Natcher v. Bowling Green, 264 Ky. 584, 95 S.W.2d 225 (1936); Michaelson v. Silver Beach Improvement Ass’n, 342 Mass. 251, 173 N.E.2d 273 (1961); State ex rel. Anderson v. Masheter, 1 Ohio St. 2d 11, 203 N.E.2d 325 (1964). The Supreme Court of California, in Colberg, Inc. v. State, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967), cert. denied, 390 U.S. 949 (1968), allowed the state to invoke its privilege of no compensation in conjunction with a project which did not benefit navigation. Perhaps if private interests are aware that they may be precluded from using their lands, without compensation, if they do not take steps to preserve the balance of nature, industry will yet be much more cognizant of ecological factors in their normal business operations.


69. This factor was noted by the district court. Zabel v. Tabb, 296 F. Supp. 764, 769 (M.D. Fla. 1969). See also COMM. ON GOV'T OPERATIONS, PROTECTING AMERICA'S ESTUARIES: THE SAN FRANCISCO BAY AND DELTA, H.R. REP. No. 1433, 91st Cong., 2d Sess. 16, 33, 39, 41, 71 (1970), where it was stated that the Corps is not at all fully responding to national environmental policies and implied that the Corps does not have the requisite expertise to make important environmental protection decisions of its own.

It is interesting to note that approximately one month after appellees instituted the suit against the Corps, the Secretary of the Army signed a Memorandum of Understanding with the Secretary of the Interior binding the Corps to an agreement by which it would consult with interested state and federal parties before issuing a permit for construction in navigable waters, 33 C.F.R. § 209.120 (Supp. 1970). This agreement left the final determination of the permit issuance to the Secretary of the Army, even though he was not the one with the conservation expertise. It is posited that this was the logical solution to a complex problem for it was necessary for someone to make an evaluation of the many reports that the Corps would receive in regards to conservation and the Corps, as the agency which finally issues the permits, was the logical one to make the determination upon receiving the various information.

conjunction with other governmental agencies who do possess the requisite expertise, 71 use these findings of possible ecological detriment in the evaluation of permit applications.

The Zabel decision is an important innovation in the struggle to preserve the environment of the coastal zone. 72 Although Congress has passed or is currently considering many bills 73 which focus upon environmental preservation, there is, regrettably, a paucity of enforcement procedures. 74 The instant case provides, for the first time, a method by which potential pollution problems can be effectively controlled before they materialize. 75 This may be the only rational solution to the pollution problem. The present practice of relying on abatement proceedings to halt pollution once it has occurred is not a satisfactory method of environmental pollution control. However, it should be recognized that the present decision is not a panacea for environmental ills. It provides, at best, a stop-gap solution which can only yield sporadic protection for the valuable coastal zone and other areas within the Corps' jurisdiction. A long term solu-


Coastal and Offshore Research: The Bureau operates 13 major biological laboratories, and several field stations and other activities in coastal and offshore research.

Increased emphasis on preservation and maintenance of estuaries and coastal areas from adverse effects of pollution, dredging and filling, industrialization and urbanization, will require more precise information on the effects of fish and shellfish.

Special research will include studies of typical food chains in representative estuaries. . . .

Id.


The coastal zone, because of its physical biological and chemical nature, is naturally an area of heightened environmental concern.

Geographically, the coastal zone is not strictly defined, but includes all shore touching on tidal water, the coastal sea and sea floors out at least to the limits of U.S. jurisdiction (3 miles or a depth of 600 feet), estuaries, bays, and inlets, coastal marsh lands, and the lands within several miles of tidal waters (the latter depending, for practical purposes, more on legal than geographical criteria).

Biologically, this is the most productive of all land or water areas on earth. Seven of the 10 most valuable species in American commercial fisheries spend all or important periods of their lives in estuarine waters. At least 80 other commercially important fish species are dependent on estuaries.

73. See note 25 supra.

74. Presently the principal method of enforcement of environmental policies and laws is by means of abatement actions which are in part provided for by the Federal Water Pollution Control Act. 33 U.S.C. § 466(g) (Supp. V, 1970). See note 34 supra. See also discussion in notes 8 & 67 supra, which suggest that there are other means by which private individuals and the Government may abate pollution.

tion is necessary not only for environmental control in areas contiguous to navigable waters but elsewhere as well.\textsuperscript{76}

Thomas B. Erekson

\textbf{LANDLORD-TENANT — LANDLORD HELD TO A DUTY OF REASONABLE CARE TO PROTECT TENANTS FROM FORESEEABLE CRIMINAL ACTS COMMITTED BY THIRD PARTIES IN THE COMMON AREAS OF AN APARTMENT BUILDING.}

\textit{Kline v. 1500 Massachusetts Ave. Apartment Corp.}  
(D.C. Cir. 1970)

Appellant Kline entered into a lease agreement with appellee landlord in 1959 for an apartment in Washington, D.C. At that time, the apartment building had internal security arrangements whereby the main entrance and lobby received twenty-four hour supervision and two side entrances were either attended or locked in the evenings.\textsuperscript{1} By mid-1966, while the crime rate in the area had risen considerably, these services had deteriorated to an extent that the main entrance was seldom supervised and the alternate entrances were left open and unguarded. On November 17, 1966, appellant was seriously injured in a common hallway of her

\textsuperscript{76} To this end, President Nixon proposed the establishment of an independent Environmental Protection Agency, Reorganization Plan No. 3 of 1970, 6 \textit{Weekly Compilation of Presidential Documents} 908, 917 (1970), which proposal became effective on December 2, 1970, and coincided with the Senate’s confirmation of William D. Ruckelshaus as the Agency’s head, 1 \textit{Environ. Rep. — Curr. Dev.} 811, 813 (1970). \textit{See Id.} 831, 859-61, for a detailed view of the organization plan for the Environmental Protection Agency. Although this proposal is a step in the right direction in seeking to alleviate much of the present confusion caused by the myriad of federal agencies now involved in the environmental protection controversy, it by no means provides any effective solution to conservation problems, primarily because it notably lacks sufficient enforcement procedures.

Recently a proposal was presented to Congress, \textit{Recommendations — The Proposed Program From The National Estuarine Pollution Study,} 1 \textit{Environ. Rep. — Curr. Dev.,} Monograph No. 3, at 12-20 (1970), which, generally, suggests a program recognizing the primary responsibility of the states in a management program for their estuarine and coastal areas, and on the federal side provides for the coordination of federal activities in these areas and for assistance to the states in their management activities. It is submitted that it is legislation such as this that is necessary not only in regard to the coastal zone but in all areas. The proposal not only suggests what has to be done, it specifies what legislation is needed to accomplish its objectives.

For a comprehensive examination of the problems associated with water pollution control refer to J. Sax, \textit{Water Law, Planning And Policy} (1968).

\textsuperscript{1} At trial, appellant testified that the impressive security precautions were a major factor in her decision to rent from appellee. \textit{Kline v. 1300 Massachusetts Avenue Apartment Corp.} \textit{--- F.2d ---} (D.C. Cir. 1970), at \textit{---} n.1.
apartment building when she was criminally assaulted and robbed by an unknown assailant. Subsequently, she initiated a civil suit against the landlord, alleging that he had breached a duty owed to appellant in that he had failed to provide adequate security measures for his tenants. The district court found as a matter of law that the landlord had no duty to provide such security. On appeal, the Court of Appeals for the District of Columbia reversed, holding that a landlord with notice of crimes within the common hallways of his building is obligated to exercise reasonable care to protect his tenants from "foreseeable" criminal acts committed by third parties in said areas and that appellee in the instant case had failed to meet this duty insofar as the standard of care required of the landlord had not been met. Kline v. 1500 Massachusetts Avenue Apartment Corporation, F.2d (D.C. Cir. 1970).

The common law duties of a landlord are centered upon two district areas of responsibility: (1) those relating to the leased premises themselves; and (2) those arising from the existence of areas not demised which are reserved for the common use of all tenants and are under the landlord's exclusive control. By virtue of his retention of exclusive control over undemised areas, the landlord bears the responsibilities of a general owner of property. As an owner, the landlord does not, in the absence of a covenant, act as the tenant's insurer, but rather is under a duty to exercise reasonable care in keeping the common areas in a safe condition. This obligation, under various circumstances, has required the landlord to

2. The court noted that these acts were foreseeable "in the sense that they were probable and predictable." Id. at __________.

3. Kline v. 1500 Massachusetts Avenue Apartment Corp., F.2d (D.C. Cir. 1970). The court concluded that "reasonable care under all the circumstances" (the standard applied in this situation) required the landlord to maintain the "same relative degree of security" as that experienced at the outset of appellant's tenancy. Id. at __________. See text accompanying notes 46-47 infra.

4. The duties of both parties to a lease are, for the most part, included in the lease agreement. These duties, generally collateral to the scope of this discussion, are the modern manifestations of the common law agrarian tenancy where the transaction was a conveyance of an estate in land. Of prime concern was the landlord's reversionary interest in the property where eventually, with the doctrine of waste and the increased length of tenancies, the tenant became obligated to make repairs and was liable to eviction and damages if he failed to do so. 3 W. HOLDsworth, A History of English Law 122-23 (6th ed. 1934), cited in Javins v. First National Realty Corp., F.2d 1071, 1077 n.30 (D.C. Cir. 1970). Today, however, the tenant does not have any great concern about whether he has an estate in land. He is primarily interested in the services of shelter and comfort.


keep his hallways properly lighted, to maintain bannisters and elevators, to keep common areas free from rodents or animals and to clear walks of snow and ice.

In order to determine whether a landlord's duty of reasonable care encompasses protection from the foreseeable criminal acts of third parties, it is necessary to examine the various bases upon which such a duty might be predicated. Traditionally, recovery under the "exclusive control" theory has been limited to damages resulting from unsafe physical conditions caused by a failure of the landlord to exercise reasonable care in keeping the "common" areas in a safe condition. In addition, an individual ordinarily has no duty to act affirmatively to prevent injury to another caused by a third party, nor any obligation to anticipate third party criminal activity unless some relationship exists between the parties imposing such an obligation. When such a relationship does exist, liability is ordinarily based on the fact that the ability of one of the parties to protect himself has been somewhat limited by his submission to the control of the other. As a result, the party possessing the superior control is accordingly burdened with a duty of exercising reasonable care to protect the subservient party. Thus, liability of the dominant party has been found in relationships such as employer-employee, business proprietor-patron.

13. See note 8-12 supra. For an argument that the "exclusive control" theory should continue to be limited to dangerous physical conditions, see 20 Rutgers L. Rev. 140, at 143 (1965).
15. See generally W. Prosser, Torts § 33, at 176-79 (3d ed. 1964) [hereinafter cited as PROSSER].
16. The Restatement (Second) of Torts §§ 448, 449 (1965), establishes a duty to guard against unilaterally created situations from which third party crimes or intentional acts will foreseeably occur. A clear application of this rule involves the case where an owner leaving his key in the ignition while parked in a known high-crime neighborhood is held liable for injuries caused by the theft of his vehicle. See Hergenrether v. East, 61 Cal. 2d 440, 393 P.2d 164, 39 Cal. Rptr. 4 (1964). Similarly, in Richardson v. Ham, 44 Cal. 2d 772, 285 P.2d 269 (1955), a bulldozer owner was liable for injuries caused by unauthorized operators of the equipment because the bulldozer had been left unlocked overnight near a canyon edge.
The question whether the landlord-tenant relationship imposes a duty upon the landlord to provide tenants with reasonable security from predictable crimes has received little judicial inquiry. The few decisions confronting this question have usually absolved the landlord from responsibility on various bases. In many instances the major drawback to obtaining relief has been the failure to establish proximate causation between the landlord's alleged breach of duty and the tenant's injury. Additionally, courts have denied relief by requiring either a contractual recital of the duty or statutory authorization for such protection. Perhaps the overriding reason for the courts' refusal to impose liability is that the landlord-tenant relationship is tied to property law concepts which negate the idea of the relationship itself creating a duty between the parties. Under traditional principles of property law, a lease is not thought of as creating a relationship wherein one party becomes subservient to the other, but rather is considered as a single transaction in which one party conveys an estate in land to another for a specified term. However, this rationale becomes untenable in the modern multiple-dwelling context where a continuing relationship is a necessity due to the tenant's continuing need for services and the landlord's exclusive control in providing them.

These aspects of the modern landlord-tenant relationship were recognized by the District of Columbia Court of Appeals in *Jacins v. First*

21. Scott v. Eastern Air Lines, Inc., 399 F.2d 14 (3d Cir. 1967), cert. denied, 399 U.S. 979 (1968); Dayen v. Penn Bus Co., 363 Pa. 176, 69 A.2d 151 (1949). While the carrier-passenger relationship is often said to impose a high standard of care, a more accurate statement is that the carrier's duty is related to the degree of control held over the passenger. Thus, in Neering v. Illinois Central R.R., 383 Ill. 366, 50 N.E.2d 497 (1943), the defendant carrier was held to a standard of "ordinary" care since the injured plaintiff was not in a train but rather in a station.
National Realty Corp., where a warranty of habitability was implied to exist in a lease. In requiring the landlord to maintain the leased premises in a reasonable condition throughout the term of the lease, the Javins court by imposing a duty upon the landlord to provide continuing repair services, recognized his superior ability to do so. A similar rationale had been applied by the same circuit in Kendall v. Gore Properties, Inc., where a landlord was held civilly liable for the murder of a tenant by one of the landlord’s employees because the landlord was deemed to have exclusive control over the employee’s contacts with the tenants and had failed to exercise reasonable care in his selection. In Ramsey v. Morrisette, the District of Columbia Court of Appeals reversed a summary judgment in favor of the landlord on facts indistinguishable from those in the instant case. Relying on Kendall, the Ramsey court made it clear that the existence of independent third-party criminal activity would not preclude a cause of action based in tort, provided that particular conduct and circumstances existed which indicated a failure on the part of the landlord to exercise reasonable care. While consideration of these developments tends to make the instant decision appear as having been foreshadowed and thus merely a logical sequel to them, the court’s application of these trends is significant and deserves further amplification.

In holding that a landlord is under a duty of reasonable care to protect tenants from predictable crime in the common areas, the Kline court relied on three distinct but complementary lines of reasoning to support its findings. This triad consists of: (1) considerations involving the “logic of the situation”; (2) an analysis of the effect of implied contractual obligations upon the landlord; and (3) an examination of both the duty imposed and the standard of care required in analogous relationships such as innkeeper-guest. Before analyzing the propriety

27. 236 F.2d 673 (D.C. Cir. 1956). Compare Kendall with Argonne Apartment House Co. v. Garrison, 42 F.2d 605 (D.C. Cir. 1930). In Argonne, defendant employer required and received references from his employee, although these were not authenticated. The court concluded that the employer was not negligent in selecting his employee. In Kendall, however, no inquiries were made concerning the employee’s fitness for employment.
30. Id. at 512.
31. F.2d at .......
32. Id. at .......
33. Id. at .......
and effect of the court’s reasoning on each of these points, it is necessary to review certain of its preliminary findings. 

Appellee's apartment was situated in a heavily traveled commercial locale in which the crime rate had risen considerably. Moreover, the appellee was held to have both actual and constructive notice of previous criminal activity being committed within his hallways with such frequency that crime was felt to be a predictable occurrence rather than merely a foreseeable event.

Having charged appellee with notice, the Kline court first approached the problem by displacing precedent and relying instead on considerations of logic and justice. After examining the circumstances the court concluded that neither the tenants nor the police could adequately provide the measures necessary to prevent a recurrence of this type of crime. Thus, by a process of elimination, the court concluded that the landlord was the only party capable of remediying the problem and should therefore be burdened with the duty to do so. Under closer scrutiny, however, it becomes evident that this line of reasoning is not helpful in answering the primary question of whether a duty should actually exist, but rather is supportive only to the extent that if a duty does exist, the landlord is the logical party to bear it. Since this rationale does not provide a legal basis for establishing that a duty exists, the court quite properly sought alternative support for its holding through reference to traditional legal principles.

On first view, the implied contract rationale, which provides that the landlord has impliedly promised to maintain a specified level of


35. Indeed, appellant testified that an increasing number of commercial offices were supplanting apartment residences in the building. F.2d at n.24. This fact makes it more likely that the flow of non-residents entering the building had also increased.

36. F.2d at

37. This court has exhibited a noticeable trend away from traditional principles when the results of their use would contradict modern notions of fairness. See note 35 supra. As a related example of how this court has displaced antiquated principles of law regarding a landowner's duties with a more realistic approach, see Daisy v. Colonial Parking, Inc., 331 F.2d 777 (D.C. Cir. 1963), where Chief Judge Bazelon chose to apply a general standard of negligence rather than the invitee-licensee standard in a case involving a "trespasser."
services throughout the leasehold period, appears convincing and adds credence to the court’s reasoning. Certainly this position is consistent with this court’s recent thinking vis-à-vis the nature of a lease agreement and in following this approach, the Kline court merely expands the scope of the “package of goods and services” to be provided by the landlord so as to include reasonable security measures. Indeed, if the premise of “implied contract” theory is sound, it would have been clearly inconsistent for the court to exclude the maintenance of any service which was originally provided. However, the limitations of a strict application of this rationale become immediately apparent when the facts in the instant case are considered. Appellant’s initial lease had expired at the time suit was brought and the tenancy had been continued on a month-to-month basis. Thus, it could be argued that the standard of care required under the “implied contract” is that degree of protection offered and accepted at the beginning of each monthly term. Therefore, carrying this argument to its logical conclusion, unless appellee had failed to provide the agreed level of protection within the month of the assault upon the appellant, there could be no breach of duty.

In carefully examining this theory as it would be applied generally, it becomes apparent that the requirement under contract principles that the initial level of protection be continued might not parallel the needs of the parties in many situations. For example, an indigent tenant would presumably continue to receive the same minimal security he experienced at the outset of his lease while the landlord to the opulent would be required to continue providing extensive security measures regardless of the possibility that such services would become unnecessary because of a decrease in crime. Thus, while the implied contract theory is significant in justifying the court’s decision, it is supportive only to the extent of justifying some duty being placed upon the landlord.

After determining that the landlord should bear some responsibility in providing security services to his tenant, the court ultimately relied on tort principles, not only to further support the imposition of a duty, but also to provide an applicable standard of care. To these ends, the Kline court analogized to the standard of care required by certain relationships.

38. See Javins v. First National Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970). In Javins, however, the implied warranty of habitability was imposed on the rationale that the District of Columbia Housing Regulations established minimum standards of habitability which the landlord was required to provide throughout the term of the lease. The section of the housing regulations which the Javins court focused upon reads in relevant part:

[The] purpose [of this part of the Regulations] is to include repairs and maintenance designed to make a premises or neighborhood healthy and safe.


39. 428 F.2d at 1074.

40. Judge MacKinnon, dissenting, argued that requiring appellee to provide security was a mistake “when the tenant knew for years that such protection was not being afforded.” .... 428 F.2d at .... (emphasis added).

41. See notes 17-22 and accompanying text supra.
notably innkeeper-guest. Although the analogy between innkeeper-guest and landlord-tenant is certainly more than a novel insight, reliance solely on this similarity would have been ill-founded due to certain controlling factual distinctions. However, when considered in conjunction with the previously accepted duties of the "exclusive control" theory, the court's application of this analogy as a vehicle for the further imposition of liability upon the landlord serves the additional purpose of providing a more acceptable basis upon which to determine the standard of care that will control his conduct — i.e., "reasonable care in all the circumstances."

If the reasonableness standard is to be accepted as controlling, an analysis of what the court required of appellee in this case brings to light areas of inconsistency. By requiring the landlord to provide "the same relative degree of security" that he was employing when the appellant became his tenant, it appears that the court is using the implied contract rationale, which suggests maintenance of an agreed level of protection throughout a specified term. Yet the strong implication remains that the standard of care utilized in the instant case is based in tort, especially since evidence of custom — the level of protection offered in similarly situated buildings — was considered significant in determining the applicable standard. However, the court finds no inconsistency in requiring appellee to maintain the original level of protection since it regards the landlord's standard of care to be the same, whether his obligation is grounded in tort or implied contract. Such a rationale does justice to neither theory since, on the one hand, it arbitrarily equates the initial level of protection with "reasonableness," while in the alternative it fails to adequately consider such factors as custom and prudence which are relevant to determining the applicable tort standard. Indeed, under tort rationale it would seem that since the court had noted the significant increase in the crime rate in the vicinity, it might have required a corresponding increase in the degree of protection required. While it is possible that the application of tort standards would indicate that the level of services originally provided by the landlord in the instant case might be considered to be "reasonable" protection; the ambiguity generated...

42. Citing Javins v. First National Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970), the court stated:
   Even the old common law courts responded with a different rule for a landlord-tenant relationship which did not conform to the model of the usual agrarian lease. Much more substantial obligations were placed upon the keepers of the inns (the only multiple-dwelling houses known to the common law).
   F.2d at ........

43. Innkeepers, excluding proprietors not offering lodging, typically engage in short-term furnished housing at a relatively high premium. Moreover, a patron of an innkeeper is traditionally held to have a license for use of the premises, which, even in the District of Columbia, has fewer ties to the lease concept of conveyance of an interest in property. See Tiffany note 12 supra, at §§ 79, 829. Perhaps the closer relationship between a hotel agreement and a short-term furnished premises lease led to the earliest example of a court's imposition of a warranty of habitability in a lease. See Smith v. Marrable, 152 Eng. Rep. 693 (Ex. 1843).

44. F.2d at ........

45. Id. at ........

46. Id. at ........
by the recognition of both implied contract and tort standards suggests that future decisions could more logically resolve this inconsistency by abandoning the implied contract standard of care since, as previously noted, the requirement that original services be maintained does not seem to fully serve either party's interest.

Thus it seems clear that the tort standard of reasonableness, being a more flexible rule, is better suited to handle the diversified situations that may arise. Yet, as might be expected, a standard of reasonableness is not without its difficulties. While the standard has been attacked as being too vague in application, a far more crucial shortcoming seems to be inherent in the number of considerations embodied in the standard. For example, when both the risk of criminal activity and the custom found in similar apartment complexes are considered separately, two distinct obligations may arise which may well be in direct contradiction to one another. In blighted urban neighborhoods the crime rate is typically very high while the custom of providing any meaningful security services is virtually non-existent. Thus, by applying the "criminal activity" criterion the landlord is duty-bound to provide extensive services, possibly resulting in substantial rent increases while under the "custom" test the tenant realizes no additional security since the landlord has met the standard by merely referring to similarly maintained buildings in the neighborhood. This dichotomy illustrates the potential uncertainty of the result when the standard is applied by a jury instructed to consider both criteria.

Although the Kline court concludes that the landlord should be obligated to provide adequate security measures for his tenant, it also finds that the landlord would be "entirely justified in passing on the cost of the increased protective measures to his tenants." As a general proposition, this conclusion appears to be quite sound. However, upon closer examination some undesirable effects may be seen as likely to emerge. As noted previously, the cost of services in low-rental apartments may place an unfair burden upon the tenant. Additionally, if the court finds that such services are required as a matter of right, based on the "bargained-for-exchange" rationale, the landlord who is bound to long term leases may find himself amidst a serious profit squeeze. In the alternative, a tenant may find that he receives fewer of the non-essential, yet

47. However, although the court discusses the possibility of a bona-fide patron in the commercial portions of the building "lingering" in the halls, (.... F.2d at n.24), no consideration is given to the possibility that the intruder is a resident of the building. Certainly this is an added difficulty, especially in a large housing complex. Additionally, the scope of security service required would ordinarily be limited to entrance controls which would have no effect on resident criminals.

48. As with negligence law generally, the numerous fact situations placed before a finder of fact undoubtedly lead to trying questions of proximate causation, foreseeability and proper damages to be awarded. Moreover, concern for improperly decided questions becomes amplified in cases where attractive plaintiffs sue impersonal target defendants such as housing authorities or private apartment corporations.


50. See discussion at supra.

51. ..... F.2d at .........
amenable services previously provided by the landlord since funds must be shifted to cover the expense of the required protective services. Finally, as an ancillary consideration, the landlord of a rent-controlled building will most likely lose anticipated profits, perhaps even to the extent that he will be forced to abandon his building.

The inherent difficulties involved in cost-distribution underscore justification for some legislative response. For example, if housing code legislation is ultimately interpreted by the courts to impose a duty on landlords to provide reasonable security measures, the legislature may be able to accomplish three desirable objectives. First, in recognizing that crime prevention is one common interest, the legislature could standardize minimum security requirements and possibly render economic aid in their installation and maintenance. Secondly, such action would alleviate financial pressures on the landlord and sustain the housing industry as a viable area of private enterprise. Finally, by establishing minimum security requirements and thus narrowing the scope of what constitutes "reasonable" precautions, the burden upon the courts and juries in determining the appropriate standards for landlord conduct would become more manageable and effective.

In the final analysis, the Kline court has balanced the immediate problem of crime in the landlord-controlled areas against the various ramifications of placing a duty upon the landlord to provide reasonable security measures to prevent such crime. The pivotal factor in the court's decision to impose this duty seems to lie in the treatment of the lease as an ordinary contract, for, in this light, the court may successfully circumvent the strong argument of vagueness implicit in the tort-based standard. Thus, since many other jurisdictions cling to tort and property concepts in dealing with the problem, the instant decision may affect only those courts willing to extend considerably the "exclusive control" theory as it pertains to tort. Moreover, the belief that this decision will open a Pandora's box both in terms of difficulties in application of the standard as well as harsh treatment of the landlord may regretfully further limit its impact.

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53. This is not to say that rent control alone can lead to abandonment. Insufficient rental income in non-controlled jurisdictions also frequently leads to this result. Additionally, "If municipal code enforcement pressures are exerted on them, many such owners will vacate and board up their buildings... . Thus, in cities where low-rent housing always is in short supply, the phenomenon of pockets of abandoned structures is becoming commonplace." F. KRISTOFF, URBAN HOUSING NEEDS THROUGH THE 1980'S: AN ANALYSIS AND PROJECTION 48-49 (1968) (Research Report No. 10 Prepared for the Consideration of the National Commission on Urban Problems).